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No.: _____

IN THE

Supreme Court of the United States

October Term, 1981

KARL LINNAS,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

IVARS BERZINS, ESQ.
Attorney for Petitioner
484 West Montauk Highway
Babylon, New York 11702
(516) 661-3540

Joel A. Brenner,
Of Counsel

Questions Presented[1]

1. Is the defense of laches available against the Government in a denaturalization proceeding?

2. Are the nature and consequences of denaturalization proceedings sufficiently "penal" that a defendant in such a proceeding is entitled to raise the Fifth Amendment privilege against self-incrimination?

3. Does fear of a *foreign* prosecution activate the privilege against self-incrimination?

4. Does a foreign "conviction" which was a sham, and which was obtained in the absence of both the accused and the effective assistance of counsel, extinguish any such privilege?

5. Should alleged copies of purported foreign documents be admitted by an American court where (a) the giving of these materials constituted a political act by a non-recognized foreign country, (b) there was substantial evidence that these materials were forgeries, and (c) they were not certified in accordance with the Federal Rules of Civil Procedure and the Federal Rules of Evidence?

6. Should foreign depositions be admitted by an American court where they were conducted (a) in the absence of the accused or his counsel and (b) under circumstances utterly lacking in due process or respect for law and decency?

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[1] As will be set forth in more detail *infra*, over 30 denaturalization and related proceedings were instituted against alleged war criminals between 1977 and 1981, and more than 200 other cases are "under investigation"; all of these are being prosecuted by the Office of Special Investigations of the Department of Justice, and all are being defended by a small group of the same defense attorneys. Accordingly, the issues in this case have been raised and will continue to be raised with increasing frequency in a large and growing number of cases.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Opinions Below

The opinion of the District Court is officially reported at 527 F.Supp. 426 (E.D.N.Y. 1981), and is set forth in Appendix [hereinafter "Appx."] H, *infra*, pp. 23a-60a.

The summary affirmance of the Court of Appeals (Feinberg, Ch.J., Mansfield and Kearse, JJ.) (Appx. A, *infra*, pp. 1a-4a) is not yet reported. The decision of the Court of Appeals denying reargument or rehearing *en banc* (Appx. B, *infra*, pp. 5a-6a) is not yet reported.

Jurisdiction

The judgment of the Court of Appeals was entered on January 25, 1982. A timely petition for reargument, with a suggestion of rehearing *en banc*, was denied on April 5, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Constitutional Provisions and Statutes Involved

1. The Fifth Amendment to the Constitution of the United States.

2. Federal Rules of Civil Procedure, Rule 44(a)(2).

3. Federal Rules of Evidence, Rule 902(3), (4).

These constitutional and statutory provisions are set forth in petitioner's Appendix I at pages 61a to 63a.

Statement of the Case

1. On November 21, 1979 the United States of America commenced an action, pursuant to 8 U.S.C. § 1451(a), to revoke petitioner's Certificate of Naturalization and vacate the order admitting him to citizenship. The basis for this action was a complaint alleging that petitioner had served in a concentration camp in Estonia during World War II and had allegedly concealed this service from immigration authorities upon his entry into this country in 1951.

2. Petitioner's answer denied these allegations and raise, *inter alia*, the defense of laches. The District Court struck this defense on the ground that it was not available against the Government. (Appx. C, *infra*, at 8a-9a.)

3. In response to the Government's Interrogatories to Defendant, petitioner declined to answer and asserted a privilege against self-incrimination based upon (a) the nature and consequences of denaturalization proceedings and (b) fear of foreign prosecution. The Government responded that denaturalization proceedings

were "civil" and that petitioner had no fear of foreign prosecution because he had been previously convicted in Soviet-occupied Estonia of the same acts alleged here. Petitioner replied that there was no proof he was the one convicted in Estonia, that that "conviction" was a sham and obtained in violation of due process, and that he still had a fear of foreign prosecution in West Germany and Israel. The District Court ruled that any privilege petitioner had was extinguished by the prior conviction.

4. The evidence against petitioner at his trial consisted, essentially, of two kinds: (a) foreign documents and (b) foreign depositions.

(a) The Government offered alleged copies of purported foreign documents for the purpose of proving that petitioner had been an officer in a concentration camp in Tartu, Estonia, during World War II and had also served in the German Army thereafter. Petitioner objected to admission of these documents on several grounds: they came from Soviet-occupied Estonia and this country had never recognized the puppet government of that country, they were forgeries, and they were not authenticated as required by statute. The District Court, however, admitted all of these exhibits and, in fact, referred to them as the "primary evidence" of petitioner's guilt (Appx. H, *infra*, at 37a).

(b) The Government also offered depositions of persons in Soviet-occupied Estonia who testified that petitioner had served in the Tartu camp. Petitioner objected to these depositions (a) because his counsel had been prevented from attending them, and (b) because they were not conducted under American procedures. Although the District Court said it was "disturbed" by certain of the deposition procedures, it admitted the depositions as "corroboration" of the documentary evidence (Appx. H, *infra*, at 37a).

5. The District Court ordered petitioner denaturalized and the Court of Appeals affirmed that decision in a summary order.

Reasons for Granting the Writ

I

The Lower Court Ruling That Laches Is Not Available As a Defense in a Denaturalization Proceeding Raises an Important Question of Federal Law Which Has Not Been, But Should Be, Decided by This Court, And As to Which the Lower Federal Courts Are in Conflict.

Petitioner was admitted to the United States in August 1951 and in February 1960 he became an American citizen. Only a year later, in May 1961, petitioner was charged in Soviet-occupied Estonia with precisely the same acts that were to form the basis of this denaturalization proceeding; in October 1961 the Soviet Union formally requested petitioner's extradition for these acts; in January 1962 petitioner was allegedly sentenced to death, *in absentia*, for those alleged acts; and in February 1962, the Soviet Union again requested petitioner's extradition.[2] It is of particular significance that all of the details of these proceedings were widely reported in the American press at the time they were occurring. See, e.g., N.Y. Times, May 23, 1961, p. 13, col. 6; N.Y. Times, Oct. 13, 1961, p. 9, col. 1; N.Y. Times, Jan. 21, 1962, p. 16, col. 6; and N.Y. Times, Feb. 22, 1962, p. 2, col. 3. In addition, the actual testimony of the alleged trial of petitioner was published in 1963 in a volume entitled "Materials From the Trial of ... Karl Linnas" (Estonian State Publ. House).[3]

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[2] These extradition requests were apparently ignored, without comment, by this Government. Perhaps the unspoken reason was, as in the refusal of similar requests to other countries, including Great Britain, that an unduly long period had elapsed since the commission of the alleged acts. See N.Y. Times, Mar. 12, 1961, p. 4, col. 1.

[3] The witnesses at the alleged trial in 1962 were the very same persons deposed in this trial in 1981.

Despite the fact that from these published reports, and from the two extradition requests, the Government had actual knowledge of facts which, if true, rendered petitioner's entry and naturalization illegal, no action was taken against petitioner at that time or for the next 18 years! It was only in November 1979 that the newly-formed Office of Special Investigations ("OSI") filed a complaint seeking petitioner's denaturalization.[4] In addition, petitioner's trial did not commence until June 1981, making the entire period of delay more than *20 years*!

When the complaint in this case was finally filed, petitioner immediately raised the defense of laches. The District Court, however, struck the defense on the ground that it was not available against the Government (Appx. C, *infra*, at 8a-9a). Whether the defense of laches is available in a denaturalization proceeding is an important question of federal law which should be, but has not been, decided by this Court.[5]

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[4] "[I]n response to resounding pressure from Congress, ... [o]n September 4, 1979, the Attorney General ordered the attachment of a Special Investigations Unit to the Criminal Division of the Department of Justice ... to expel war criminals from the United States." COMMENT, *Denaturalization of Nazi War Criminals: Is There Sufficient Justice For Those Who Would Not Dispense Justice?*, 40 Md. L. Rev. 39, 42-43 (1981) (Hereinafter *"Denaturalization, etc."*).

[5] In passing, it should be noted that the two elements of laches have been established.

First of all, the Government's failure to commence this proceeding for more than 18 years after it had full knowledge of all of the necessary facts constitutes a clear lack of diligence. As one commentator has stated: "Certainly the Government has not proceeded diligently in bringing its cases against the alleged Nazi war criminals." COMMENT, *Federenko v. United States: War Crimes, The Defense of Duress, and American Nationality Law*, 82 Col. L. Rev. 120, 170, n. 161 (1982). See, also, 128 Cong. Rec. *supra*, at E. ("During the years when the Immigration and Naturalization Service had responsibility for bringing former Nazi war criminals to trial, the INS was negligent in failing to investigate charges of alleged Nazi war criminals in the United States. Despite

(footnote continued on following page)

a) Importance of the Issue

It cannot seriously be doubted that the issue of whether the defense of laches is available in a denaturalization proceeding is an "important issue of federal law." In fact, this Court granted certiorari to consider this very issue more than twenty years ago in *Costello v. United States*, 362 U.S. 973 (1960). Although the Court ultimately did not reach this issue (see (b), *infra*), the passage of time has heightened, rather than diminished, the need for such resolution.[6]

In particular, the surge in denaturalization proceedings brought by OSI has raised, and will continue to raise, this issue before more and more courts. OSI instituted more than 30 suits just between 1977 and 1981 (*Denaturalization, etc., supra*, 40 Md. L. Rev. at n. 133), and the issue has arisen in many of them. See, e.g., *United States v. Federenko*, 455 F.Supp. 893, 898, 918-19 (D.C. Fla. 1978) ("first of many [denaturalization suits] against East-European prison guards now in the United States"), *rev'd on other grounds*, 597 F.2d 946 (5th Cir. 1979), *aff'd.*, 449 U.S. 490 (1981); *United States v. Walus*, 453 F.Supp. 699, 702, 716

(footnote continued from preceding page)
credible allegations, for 25 years the INS made no serious effort to pursue the investigation of these charges.").

Second of all, petitioner was clearly prejudiced by this delay. The events at issue allegedly occurred over 40 years ago, and this lengthy passage of time has resulted on the dimming of memories, if not their extinguishment by death; accordingly, petitioner's right to call witnesses on his behalf and/or cross-examine prosecution witnesses has been seriously curtailed, if not destroyed. See, e.g., *Denaturalization, etc., supra*, 40 Md. L. Rev. at 73-74, 75-77.

In addition, and where the "primary evidence" against petitioner consisted of alleged copies of purported *40-year old* documents, petitioner's inability to prove or disprove the authenticity of these materials constitutes prejudice of the higher order.

[6] The importance of this issue derives from the fact that delay, in general, implicates numerous constitutional protections including due process, the right to present a defense, and the right to confrontation and cross-examination. See *Costello v. United States*, 365 U.S. 265, 282-284 (1961). Where the events at issue allegedly took place more than 40 years ago, any unnecessary delay seriously hampers the assertion of these rights.

(D.C. Ill. 1978), *rev'd. on other grounds*, 616 F.2d 283 (7th Cir. 1980); *United States v. Kowalchuk*, Civ. No. 77-118, Slip Op. at 10, n. 2 (D.C. Pa., Oct. 20, 1978).[7]

In addition to the suits already begun, more than 220 are currently "under investigation," 128 Cong. Rec. E 690, 691 (daily ed. Mar. 2, 1982) (extension of remarks of Rep. Lehman), and hundreds, if not thousands, more are likely. See, e.g., N.Y. Times, May 17, 1982, p. B-11, col. 1 (Revelation by former OSI prosecutor that more than 300 Byelorussian Nazis were smuggled into this Country after World War II and are still "living in America today").[8]

As stated in Stern & Greesman, Supreme Court Practice (5th Ed. 1978), § 6:30 (at p. 408):

> "In general, the importance of a case depends on how many other persons, apart from the actual litigants, will be affected by the questions presented."

In view of this, it seems clear that this Court will eventually have to decide the issue of whether laches is a defense, just as it had to decide whether duress was a defense. *United States v. Federenko, supra.* It is respectfully submitted that this issue should be decided now, before more suits are filed and more courts have to struggle with it.

b) Lack of Resolution of This Issue by This Court

In *Costello v. United States, supra*, this Court granted certiorari to consider, among other issues, the availability of laches in a denaturalization proceeding. However, when the Court decided that case,

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[7] Many of these suits are still in the pre-trial stage and/or have otherwise not resulted in officially reported decisions, but the *Kowalchuk* case indicates that this issue is also being raised in such cases.

[8] Just as OSI is *prosecuting* all of these cases, a small group of the same lawyers is *defending* them. Compare United States v. Linnas, supra ("Ivars Berzins, for defendant") with *United States v. Trucis*, 89 F. R.D. 671, 672 (D.C. Pa. 1981) (same). Accordingly, it can reasonably be assumed that defense counsel are aware of and will continue to raise this issue.

it found it necessary to resolve that issue because it found that the petitioner had not satisfied either of the elements of the defense:

> "None of the cases in this Court considered the question of the application of laches in a denaturalization proceeding. However, even if we assume the applicability of laches, we think the petitioner failed to prove both of the elements which are necessary to the recognition of the defense." *Costello v. United States*, 365 U.S. 265, 282 (1961).

Accordingly, the issue raised in this petition remains open in this Court.

c) Conflict in Lower Federal Courts

Because of the inconclusive nature of the decision in *Costello*, the lower federal courts have been in conflict and disarray as to both the holding and the meaning of that case.

I) Some cases have held or implied that *Costello* supports the proposition that, at least under certain factual circumstances and/or in certain kinds of proceedings, laches *may* be asserted against the Government.

In *United States v. Oddo*, 314 F.2d 115 (2d Cir. 1963), the defendant argued that *Costello* "at least provisionally, opened the door to the assertion of the defense of laches in a denaturalization proceeding." *Id.* at 118. Although the court did not find it necessary to decide that issue, it agreed that:

> "*Costello* lends some support to Oddo's position; it is arguable that the case may be regarded as standing for the proposition that *the Supreme Court has not foreclosed the possibility that laches may apply against the Government in a denaturalization proceeding.*" *Id.* at 119 (emphasis added).

II) Other cases have held that *Costello* did not change prior law barring the defense of laches.

In *United States v. Weintraub*, 613 F.2d 612 (6th Cir. 1979) the defendant, as in *Oddo, supra*, argued that "the fact that the [Supreme] Court at least considered laches in *Costello* suggests that in a proper case it could be a defense against the sovereign." *Id.* at 618. The court disagreed and said:

> "The language [of *Costello*] ... admits to no exceptions to the rule that laches cannot defeat the government. This rule is of such long standing that we do not believe the Supreme Court would carve out an exception to it without expressly saying so." *Id.* at 618-19.[9]

III) A last group of cases has purported to carve out exceptions to the rule of no defense of laches, either ignoring or distinguishing *Costello*.

United States v. The Richard J. Moran, 201 F. Supp. 570 (D. Maine, 1962), the first case to cite the *Costello* decision, is such a case. Although *Costello* was referred to as one of many cases asserting a "general rule" or "broad proposition" that "laches will not bar the government," *id.* at 573 and n. 2, the court held that it had not extinguished an *exception* to the rule where "the rights of a *bona fide* purchaser have intervened." *Id.* at 572 and n. 1. Of particular importance here, the court ruled that this exception could only be extinguished by "bind precedent," and that neither *Costello* nor any of the other "general" cases constituted such precedent. *Id.* at 573. Since the claimant in this case was an innocent purchaser, the defense of laches was upheld and the Government's libel was dismissed.

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[9] Interestingly, and despite the court's professed belief that *Costello* did *not* permit the defense of laches, the court then went on to discuss the elements of that defense and to hold that the defendant had not satisfied them ("even if we were to agree that *Costello* left the door slightly open to a laches defense ... , the crack is not wide enough to let appellant inside" *Ibid.*).

The federal courts in the Fifth Circuit have applied the defense of laches in a series of suits for back pay by the Equal Employment Opportunity Commission ("E.E.O.C.") on the ground that they are private, not public, actions. See, e.g., *E.E.O.C. v. Griffin Wheel Co.*, 511 F.2d 456, 459 and n. 3 (5th Cir. 1973); *E.E.O.C. v. Bell Helicopter*, 426 F.Supp. 785, 788-90 (D. Tex., 1976).

In *Lane v. United States*, 633 F.2d 1384 (Ct. of Claims, 1980), *opin. on rehearing*, 639 F.2d 758 (Ct. of Claims, 1981) the defense of laches was held to bar a Government counterclaim (in a suit for back pay) for repayment of illegal gratuities. Of particular importance is the following:

> "Defendant ... claims the benefit of the universal rule that laches do not run against the sovereign. See *Costello v. United States*, [supra] .... While originating in notions of royal infallibility, this rule is generally imputed in modern times to a policy against allowing public property and rights to suffer by the negligence of public servants. Modern statements of the rule are usually so phrased as to allow the occurrence of exceptions .... We do not ... intend to overrule the Supreme Court cases above-cited. The public policy basis of the rule speaks in favor of an exception to it in the instant case." 639 F.2d at 761.

See, also, *Roberts v. Morton*, 549 F.2d 158, 163 (10th Cir. 1976) ("Some relaxation of these strict rules [barring the defense of laches against the government] might be developing ..."); *United States v. Arrow Transportation Company*, 658 F.2d 392, 395 (5th Cir. 1981) ("the trial court correctly stated the general principle that 'the once unquestioned doctrine that governments are generally immune from ... defenses has been greatly eroded' by Congress and the Supreme Court ...").

The basis of the rule that laches is not available against the Government stems from fear of loss of *property and/or fiscal rights* because of the negligence of public servants. *United States v. Costello, supra.* It cannot seriously be argued that comparable governmental interests are at stake in a denaturalization proceeding. Of equal or, perhaps, even greater importance, are the interests on the other side of such a proceeding: petitioner is seeking to retain his American citizenship — "all that makes life worth living." *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922).

In sum, the issue of whether laches is available as a defense to a denaturalization proceeding is an important issue of federal law which has not been, but should be, decided by this Court. Accordingly, the writ should issue.

II

The Lower Courts' Rejection of Petitioner's Claim That a Defendant in a Denaturalization Proceeding Has a Privilege Against Self-Incrimination Is in Conflict with Prior Decisions of This Court.

Over the last 40 years, this Court has grafted various protections of the criminal law onto denaturalization proceedings. In *Schneiderman v. United States*, 320 U.S. 118, 160 (1943) the Court ruled that "the Government should be limited, as in a criminal proceeding, to the matters charged in its [denaturalization] complaint." In *Baumgartner v. United States*, 322 U.S. 665, 670-71 (1944), the Court ruled that it would conduct a *de novo* review of the evidence on appeal. In *Klapprott v. United States*, 335 U.S. 601, 612 (1949) the burden of proof placed upon the Government was declared to be "substantially identical with that required in criminal cases — proof beyond a reasonable doubt."

Finally, in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 165-66 and n. 20 (1963) a statute which, *inter alia*, provided for denaturalization of a naturalized citizen was held unconstitutional because it

> "employed the sanction of deprivation of nationality as a punishment ... without affording the procedural safeguards guaranteed by the Fifth and Sixth Amendments ... [*including the right*] *no[t to] be compelled ... to be a witness against himself ...*" (emphasis added).[10]

The Court of Appeals agreed that the District Court had "consistently rejected [petitioner's] fifth amendment claim in the context of denaturalization proceedings" (Appx. A at 3a). However, and despite the clear conflict between the District Court ruling and the *kennedy* case, the Court of Appeals held that the issue was "moot" because the District Court "expressly disavowed reliance on any adverse inferences drawn from [petitioner's] refusal to testify" (*Ibid.*). Simply stated, the Court of Appeals was wrong.

In the first place, although "disavowing" reliance on any adverse inferences, the District Court did *in fact* comment repeatedly and negatively on petitioner's refusal to testify. For example, the Court's decision ordering petitioner denaturalized relied heavily on petitioner's "failure" to testify and/or rebut various portions of the Government's case (see Appx. H at 25a-27a, 28a, 31a, 36a, 38a, 40a).

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[10] Prior to *Kennedy*, some lower federal courts had rejected a denaturalization defendant's right to claim the privilege, on the ground that denaturalization proceedings were "civil" rather than criminal. See, e.g., *United States v. Matles*, 247 F.2d 378, 381-82 (2d Cir. 1957), *rev'd. on other grounds*, 356 U.S. 256 (1958); *United States v. Costello*, 275 F.2d 355, 358 (2d Cir. 1960) (citing *Matles*), *aff'd. without passing on this issue*, 365 U.S. 265, 277-78 (1961). Since *kennedy* (with the exception of this case), the lower courts seem to have assumed that the privilege is available: no contrary decisions have been disclosed by counsel's research, and neither *Matles* nor *Costello* has even been cited since *Kennedy*.

In the second place, and of equal if not greater importance, the District Court punished petitioner in numerous other ways for maintaining his Constitutional rights. See *Griffin v. California*, 380 U.S. 609, 614 (1965) (improper to impose *any* penalty for claiming privilege if it "cuts down on the privilege by making its assertion costly").

In this case, the assertion of the privilege "cost" petitioner the following:

a) In response to petitioner's assertion of the privilege, the trial court accepted as established beyond a reasonable doubt all of the facts that the Government alleged in its discovery and interrogatory requests, and in denying defense counsel's motion to dismiss the complaint after the prosecution presented its case, the court expressly stated that it used such "established facts" in holding that the Government had met its burden of proving a *prima facie* case;

b) Because Petitioner continued to assert the privilege, the trial court denied him permission to depose witnesses for the defense, refused to issue a protective order governing the deposition of prosecution witnesses in the Soviet-occupied Estonia, and reversed a prior ruling and directed *petitioner* to pay the cost of his counsel traveling to that country for these depositions; because petitioner could *not* pay these costs (estimated at $7-20,000), he was deprived of the assistance of counsel at these depositions. Since the trial court explicitly relied on these uncounselled depositions in convicting petitioner, and since this evidence was a direct consequence of petitioner's assertion of the privilege, the Court of Appeals was also wrong in stating that the District Court relied on "independent evidence" (Appx. A. at 3a) to reach its conclusions;

c) And last, but by no means least, the Government was able to use a photograph petitioner had been forced to admit as the basis for the identification procedures, and to use a signature he was forced to admit to tie him to alleged "concentration camp" documents.

In sum, petitioner was wrongfully deprived of his right to claim his privilege against self-incrimination and was penalized for continuing to assert that right, all in defiance of prior rulings of this Court. Accordingly, the writ must issue.

III

The Issue of (A) Whether the Privilege Against Self-Incrimination Applies to Fear of *Foreign* Prosecution and, If So, (B) What Kinds of Foreign *Convictions* Can Extinguish It, Present Important Questions of Federal Law Which Should Be, But Have Not Been, Decided by This Court, and As to Which the Lower Federal Courts Are in Conflict.

As an alternate basis for claiming the privilege against self-incrimination, petitoner asserted a fear of foreign prosecution in Soviet-occupied Estonia, West Germany and/or Israel. Petitioner also argued that an alleged "conviction" in Estonia could not extinguish this privilege because it was a "sham" and procured under circumstances antithetical to decency and due process. Without elaboration or explanation, the District Court simple ruled that the alleged Estonian conviction barred petitioner from claiming this privilege (Appx. D, *infra*, at 12a).

A. The issue of whether the protection of the Fifth Amendment applies to fear of foreign prosecution presents an important issue of federal law[11]

Because the basis for all of the alleged "war criminal" denaturalization proceedings are acts allegedly committed in *foreign* countries, the issue of whether fear of prosecution in such a country (or countries) gives rise to a Fifth Amendment privilege has arisen in many of the proceedings instituted to date. See, e.g. *United States v. Trucis*, 89 F.R.D. 671, 672-74 (D.C. Pa. 1981) (fear of prosecution in Soviet Union, Israel and West Germany); *United States v. Maikovskis*, No. M18-304 (S.C.N.Y.), aff'd. 584 F. 2d 974 (2nd Cir. 1978) (fear of prosecution in Latvia and other countries); *United States v. Kowulchuk*, Civ. No. 77-118, slip op. at 2-9 (D.C. Pa. Oct. 20, 1978)

[11] The basis of petitioner's claim that he may still be prosecuted in Soviet-occupied Estonia is set forth in B, *infra*. However, and even assuming, *arguendo*, the validity of the alleged Estonian conviction, petitioner still has a reasonable fear of prosecution in West Germany and Israel. Accordingly, the resolution of this issue still presents a live "case or controversy."

The basis of petitioner's fear of prosecution in West Germany is two-fold. In a letter sent by the United States Attorney for the Eastern District of New York to then-Secretary of State Kissinger, requesting the assistance of the latter in procuring Soviet evidence against petitioner, it was stated:

> "Based on this evidence, we may also be in a position to stimulate an appropriate investigation by the West German authorities who may then seek Linnas' extradition to face charges for his crimes" (Ex. A. to Gov't Motion to Compel Answers to Interrogatories).

And the Americans and West Germans are cooperating in considering a proposal that would treat non-German naturalized American citizens as Germans for purposes of extraditing them to West Germany. See N.Y. Times, Nov. 15, 1981, p. 27, col. 1.

The basis for petitioner's fear of prosecution in Israel in also two-fold. Israel has cooperated with OSI in locating and deposing witnesses in this and other "war criminal" proceedings (*Denaturalization, etc., supra*, 40 Md. L. Rev. at 75, n. 162), and might well seek petitioner's extradition; as was noted in *United States v. Kowulchuk, supra*, Slip Op. at 8, "It would be most unreasonable for this Court to assume that neither the ... Government of the State of Israel nor any other jurisdiction would be likely to prosecute ...." Furthermore, "the distinct possibility of extradition in fact, with or without legal sanction, cannot be overlooked." *Id.* at 9.

(fear of prosecution in Poland, Israel and other countries). See, also, 128 Cong. Rec., *supra*, at E 690-97 (noting two other proceedings in which this issue has been raised). And in view of the fact that, as previously noted, the same small group of defense counsel are defending virtually all of these cases, it may be assumed that they are familiar with, and will continue to raise, this issue in future proceedings.

A further demonstration of the importance of this issue is that this Court previously granted *certiorari* to decide it in *Zicarelli v. New Jersey State Commission of Investigation*, 401 U.S. 933, 934 (1971). The case, however, was disposed of on other grounds and the issue was left open. *Id.* at 406 U.S. 472, 478 (1972) ("It is unnecessary to reach the constitutional question in this case").

The lower federal courts are in clear conflict on the issue. In the case of *In Re Parker*, 411 F.2d 1067, 1070 (10th Cir. 1969) it was held that "The fifth amendment ... should not be interpreted as applying to acts made criminal by the laws of a foreign nation". Contrary holdings appear in *Mishima v. United States*, 507 F. Supp. 131, 135 (D.C. Alaska, 1981) ("a claim of Fifth Amendment protection may validly be asserted ... as a protection against the threat of prosecution in Japan"); *United States v. Trucis, supra*, 89 F.R.D. at 673 ("I cannot, consistently with the Fifth Amendment, direct Trucis to give what may be incriminating testimony ... where [there exist] ... possible foreign prosecution"); *In Re Letters Rogatory*, 448 F. Supp. 786, 790 (D.C. Fla. 1978) ("the witness ... is entitled to assert his Fifth Amendment privilege against self-incrimination since there is a reasonable and appreciable fear of foreign ... prosecution ... "); and *In Re Cardossi*, 351 F. Supp. 1080, 1086 (D.C. Conn. 1972) (same).[12]

[12] Other courts have avoided deciding this "difficult question concerning Fifth Amendment protection against self-incrimination" (*In Re Grand Jury Proceedings*, 532 F.2d 404, 406 [5th Cir. 1976]) by ruling that any fear of foreign prosecution was too "speculative" or "conjectural." *Ibid.* See, also, *In Re Federal Grand Jury Witness*, 597 F.2d 1166 (9th Cir. 1979); *United States v. Yanagita*, 552 F.2d 940 (2d Cir. 1977). As demonstrated in the prior footnote, the fear of foreign prosecution here is all too real.

In sum, the issue of whether the fear of a foreign prosecution gives rise to the privilege against self-incrimination presents an important and recurring question of federal law, which is undecided by this Court and as to which the lower federal courts are in clear conflict. Accordingly, the writ must issue.

B. The alleged Estonian "conviction" could not extinguish the privilege against self- incrimination for several reasons

First of all, uncontradicated testimony established the "political" nature of this proceeding. Several defense witnesses testified that alleged "war crimes" trials were "political" trials (Tr. 457-60, 639-40) and the trial court ruled:

> "I find that the Soviet judicial system ... is unfair ... [and] the Politburo manipulates the courts" (Tr. 643).

The United States does not recognize the Soviet puppet government in Estonia, and the law is that the courts of this country will not give effect to the "political" acts of non-recognized nations. Accordingly, the alleged Estonian "convictions" cannot extingush petitioner's right to claim the privilege. See, e.g. *Banco Nacional De Cuba v. Sabbatino*, 376 U.S. 398, 416-20 (1964) ("acts of state" doctrine, preventing inquiry into validity of acts of foreign countries, does *not* apply to non-recognized governments); *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss Jena*, 433 F.2d 686, 699 (2d Cir. 1970) ("political" acts of non-recognized government will *not* be given effect in courts of this country).

Second, and perhaps of greater importance, this "conviction" was defective under both Soviet and American law.

Defense witnesses testified to the workings of the Soviet courts, both in general and in this particular case.

Frederick Neznansky testified that he had spent 25 years in the Soviet legal system as both a prosecutor ("procurator") and a defense attorney; the District

Court found him qualified as an expert on the Soviet judical system (Tr. 622-29).

He said that while "Codes of Criminal Procedure" exist for each republic (modeled on that of the Russian Code), the "main legislative guidance in the Soviet legal system is secret party circulars which are never made public, but are to be studied by judges, prosecutors and investigators". Accordingly, there are "two systems of justice at least in the Soviet Union ... [and] the Soviet law changes perenially and can be described as being in state of fervor all of the time" (Tr. 630-32).

With regard to "political" crimes, such as an accusation of being a war criminal, "no codes of criminal procedure ... are applicable":

> "Witnesses are indeed trained to testify according to the wishes of the prosecution.
>
> * * *
>
> Sometimes witnesses are threatened in a more serious way of being accused of prejury, threatened with being accused of complicity in the given crime.
>
> And evidence is also falsified on occasion. For example, a witness ... will be bothered sufficiently enough to change his testimony in the desirable way eventually .... For example, ... a judge would call me sometimes and tell me, you sent us this witness and he changed his testimony in court .... We will recess the court for a couple of days. Could you work him over a little bit more. So call the witness back and make him change his testimony.
>
> From the experience of my colleagues and people I know in the KGB, sometimes they falsified the transcript of a witness' testimony" (Tr. 639-41).

Judges and prosecutors would "tamper" with trials because "The real judge and prosecutor in the Soviet Union is the Politburo of the Communist Party" (Tr. 642).

Imants Lesinskis, a former Latvian Communist party member testified via deposition,[13] said that from May 1970 to September 1976 he had lived in Latvia and had been the chairman of the "Latvian Committee for Cultural Relations of Latvians Abroad."

On behalf of the committee he attended a trial of alleged war criminals in 1965:

> "I had legal training for four years and I was offended in just looking at that kind of trial where the procedures, the witnesses — many of the testimonies seemed to be heavily biased, and also the defense was very weak. There was no defense, there were — some of the defendant's attorneys were using such language as to incriminate the defendants ... .
>
> * * *
>
> [M]y firm conviction [is] that in political trials there is no objectivity in the Soviet Union.
>
> * * *
>
> I, for instance, believe that this trial ... was a political trial because all of the defendants had already been tried and sentenced to long terms of imprisonment. *Even under Soviet law the trial proceedures were illegal* and there was no other purpose of that trial than to make propaganda" (*Id.* at 10-11; emphasis added).

As noted previously, based on the foregoing, the District Court ruled:

> "I find that the Soviet judical system for these pruposes, for this trial, is unfair, that testimony is contrived, that the Politburo manipulates the courts" (Tr. 643).[14]

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[13] Admitted as a Defense Exhibit (Tr. 648).

[14] The prosecutor had previously conceded that the state interfered in and influenced the outcome of trials in which the Soviet Union had an interest (Tr. 638).

In adition to this general testimony, **Dr. Tonu Parming,** an expert on Soviet-Baltic relations (Tr.419-24) testified about the alleged Estonian "conviction" of petitioner.

The trial of this case was scheduled to take place January 2, 1962. The official journal of the Soviet public prosecutor decided to publish a "report" of the trial, but in order to have it in the edition most closely following the trial (January 15) the material had to be prepared 2½ to 3 months *before* the publication date. Accordingly, the editor decided to prepare the material "in advance": he sent a correspondent to interview the prosecutor who, "flattered by the attention being paid the affair by a national magazine, willingly provided the interviewer not only with the text of the speech he was going to make, but also with the *details of the sentence to be passed*"; there was nothing left for the correspondent to add but that the sentence — death for all accused — "had met with the unanimous approval of the public" (Tr. 443-4).

The "sham" nature of the trial might not have become known but for the fact that it was adjourned for two weeks. Accordingly, when it commenced on January *16* many of the people entering the courtroom carried copies of the magazine describing the details of the trial, the sentence and the publics' "reaction", *before* any of these occured.[15] Several of the magazine's officials were dismissed from their positions and from the party (Tr. 445).

In view of the foregoing, the findings of District (now Circuit) Judge Mansfield concerning the operation of the courts of another non-recognized Soviet-occupied East European country, which findings were specifically affirmed by the Second Circuit, are highly apposite:

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[15] This incident was reported in a book entitled "The Russians" by Leonid Vladimirov, published by Frederick Prager in 1968 (at pp. 89-90) and in Luryi, *The Role of Defense Counsel in Political Trials in the U.S.S.R.*, 7 Manitoba L. J. 306, 314-15 (1977).

"[I]t must be recognized that East German courts do not speak as an independent judiciary of the type found in the United States or even in West Germany, but orient their judgment according to the wishes of the leaders of the socialist state, which are expressed through two coordinated administrative organs, the Ministry of Justice and the Office of the Attorney General. See "The Administration of Justice and the Concept of Legality in East Germany," 68 Yale L.J. 705, 707 (1959). In short, even the East German Supreme Court is made responsible to the highest authorities of the state as a means of insuring 'that the content of socialist law and its implementation through the courts are in harmony with the overall state administrative activity during the period of the comprehensive construction of socialism".[3] Law and Legislation in the German Democratic Republic (Comments on 1963 Decree as to Fundamental Tasks and Methods of Work of the Judiciary Organs (East Germany) ... .

[T]he decisions of the Supreme Court of East Germany [are] so completely lacking in any objectivity of approach and so thoroughly saturated with a combination of communist propaganda, diatribes against the "capitalist oriented' decisions of the West German courts, and absence of judicial restraint, that any logical analyst is obfuscated by their obvious political mission.

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[3]. Toward this purpose East German judges after being selected by the Ministry of Justice are 'instructed' by it and are removable for inefficiency or unreliability arising out of policy differences. The 'judge remains a simple party servant', 68 Yale L.J. 707-12, 749 (1959)."

Carl Zeiss Stiftung, etc., supra, 293 F.Supp. 890, 906-907 (S.D.N.Y.), *aff'd*, 433 F.2d 686, 700 (2d Cir. 1970).

In sum, while the courts of this country will not require that *every* procedure of a foreign court comports with American notions of due process, petitioner's alleged conviction was based upon "procedures ... so antipathetic to a federal court's sense of decency" (*United States ex rel. Bloomfield v. Gengler*, 507 F.2d 925, 928 [2d Cir. 1975]), that it may not be accorded either recognition or respect. Accordingly, it could *not* deprive petitioner of his privilege against self-incrimination.

The issue of the validity of "convictions" similar to this one has been raised in at least one other case counsel is aware of, see *United States v. Maikovskis, supra*, and will, no doubt, be raised in many more to come. It presents important questions of public policy and judicial administration which ought to be, but have not been decided by this Court. For these reasons, the writ should issue.

IV

The Determination of Standards for Admitting Copies of Documents From Non-Recognized Foreign Countries Raises Important Issues of Federal Law Which Ought To Be, But Have Not Been, Decided By This Court.

The District Court admitted alleged copies of numerous purported "foreign documents" into evidence;[16] according to the District Courts' opinion, these

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[16] Roughly speaking, these materials fell into three categories. Government Exhibits (hereinafter "GX") 22, 23 and 25 were alleged copies of a purported high school diploma of petitioner, and applications for temporary withdrawal from, and re-instatement to, Tartu University. GX 2-10 and 12-16 are alleged copies of purported German military records and correspondence referring to one "Karl Linnas." And GX 11, 24, 26-28 and 30 are alleged copies of purported Estonian military records referring to one "Karl Linnas." (Petitioner has requested transmittal of all of these documents to this Court, pursuant to Rule 19.1 of the Supreme Court Rules.)

documents constituted the "primary evidence" against petitioner (Appx. H *infra* at 37a). The Court of Appeals rejected petitioner's objections to these documents as follows:

> "[T]hese materials complied with the requirements of the federal rules [Federal Rules of Civil Procedure (hereinafter F.R.C.P.) 44(a)(2) and Federal Rules of Evidence (hereinafter F.R. Evid.) 902 (3)(4)], especially since the rules were 'designed to meet the practical problems in obtaining properly authenticated documents from abroad by abolishing all unnecessary procedural requirements,' [5 J. Weinstein and M. Berger, Weinstein's Evidence paragraph 903 (3)[01] 1978]" (Appx. A *infra*, at 3a).

Petitioner has raised several separate, but related, objections to the admission of these materials.

A. In the first place, it is petitioner's contention that the non-recognition of the Soviet puppet regime in Estonia is an absolute bar to an American court accepting the alleged Estonian documents (GX 11, 22-28, and 30).

The situation here was accurately and forcefully described in *In Re Luks Estate*, 45 Misc. 2d 72, 74-75, 256 N.Y.S.2d 194, 196-7 (Surr. Ct., N.Y. Co. 1965):

> "The problems here presented arise from the facts that a powerful aggressor nation overwhelmed its small neighboring nations, ousted their chosen governments and instead installed puppet governments not responsive to the needs or wants of the citizens of those nations.
>
> * * *
>
> The Government of the United States has never recognized the forceful occupation of Estonia ... by the Union of Soviet Socialist Republics nor does it recognize the absorption

> and incorporation of ... Estonia into the Union of Soviet Socialist Republics. The legality of the acts ... of the puppet regimes set up in these countries by the Union of Soviet Socialist Republics is not recognized by the United States, diplomatic or consular offices are not maintained in ... Estonia ... and full recognition is given to the Legation ... of Estonia ... established and maintained here by the government in exile of those countries."

While there has been some relaxation of this rule (e.g., in the area of commercial transactions), the rule still applies in full force to "political" acts of non-recognized countries because:

> "our courts can give no effect to an act of an unrecognized government which either by implication or otherwise would indicate recognition of that government" (*Ibid*; citations omitted).

As noted previously, petitioner produced uncontroverted testimony that matters involving alleged "war criminal" are considered "political" by the Estonian puppet government (Tr. 639). Accordingly, the turning over of the materials by representatives of that government constitutes a "political act," and neither that act nor the materials may be recognized in an American court.

Although this Court touched on the questions of judicial "notice" of the general acts and "political" acts of unrecognized countries in *Banco Nacional De Cuba v. Sabbatino, supra*, 376 U.S. at 408-412 (1964), resolution of these matters was not necessary to the decision reached, and the issues remain open. They are bound to recur with greater frequency as OSI brings prosecutions against other Estonians as well as persons from other non-recognized countries such as Latvia, Lithuania, Albania, East Germany, etc.[17]

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[17] For a list of current proceedings and the countries involved, see 128 Cong. Rec. E 690-97 (daily ed. March 2, 1982).

Accordingly, this case presents an important issue undecided by this Court and the writ must issue.

B. Putting aside the non-recognition issue, it is petitioner's contention that all of the documents should have been excluded because, simply stated, they were *forgeries.*

A brief summary of the testimony in support of this contention is as follows:

Dr. Tonu Parming, an expert on Soviet-Baltic relations (Tr. 419-24), testified that the Soviets "re-write" history as a matter of Communist Party policy (Tr. 426), and this has led to a "large question about the validity or reliability of documents" concerning Estonia:

> "Soviet Estonian sources have on occasion used documents which are purported to come from the archives – the classified archives of the Foreign Ministry of the Soviet Estonian Republic, the pre-World War II government. And yet the custodian of those classified archives resides in Sweden and he has written that in fact the classified archives under his direct supervision were destroyed before the Soviets took control of the country" (Tr. 432).[18]

Accordingly, with regard to documents purporting to come from Estonian archives, Parming's opinion,

> "as an expert, [was] that in such a case there is doubt as to the reliability or the validity of the document. I would not accept such a document without further research or trying to validate that in fact the document did come from the archives" (Tr. 433).

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[18] In *United States v. Walus, supra,* 453 F.Supp. at 708, the court took note of testimony by a Government witness that German files were "largely intentionally destroyed near the end of the war" and that Nazi records in German archives were "extremely incomplete." The situation regarding German and Estonian records in Russian archives must be similar; it is therefore highly suspect that the precise documents needed to incriminate petitioner survived this destruction.

In 1959 the Soviets began printing and mailing to Estonians living abroad an unsolicited magazine entitled "Kodumaa (Homeland)." This contained propaganda attacking Estonians living in the West; the older emigres were all labelled "Fascists or Nazis," and the younger emigres were labelled CIA agents (e.g., Anatoly Scharanski). False and derogatory information was spread about the emigres who were still in Estonia before the Soviets re-occupied it; anyone who worked against the Soviets during this period was accused of being a "Fascist or a Nazi."

In answer to a hypothetical question containing the facts of this case, Dr. Parming said "I would have a much greater propensity to be suspicious of documents [made available by the Soviets] or look for political purposes"; he also noted that "The practice has been alleged in the West by other experts that documents are falsified in the Soviet Union" and that "testimony appears to have been forged" in some recent Soviet trials (Tr. 457-60).

Melbourne Hartman testified that he joined the Central Intelligence Agency in 1951 and worked in the counterintelligence section concerned with the Soviet Union and the Baltic states, including Estonia. He has studied "Soviet dis-information operations and forgeries" aimed at accusing Baltic emigres of war crimes so as to discredit any such persons who saw Soviet atrocities during the 1940 occupation (Tr. 574-86).

He said the Soviets have been forging documents for 65 years and "They are masters at it"; he referred to the testimony before Congress in 1961 of Richard Helms, later to become director of the CIA, in which Helms produced a copy of what purported to be Newsweek magazine, in which the Soviets had placed forged articles and propaganda. The Soviets "forged and fabricated all kinds of evidence," documentary and testimonial, in the 1930's "purge" trials; they also provided forged documents at a trial in England (Tr. 587-90, 596-97).

He also believed that the Soviets "forged," "phonied" and "manipulated" captured World War II German records (Tr. 599-603). He said he had never seen documents such as GX 13 and 14 (alleged "Organization Charts" of the German Army) and he could not say they were authentic (Tr. 611-12).

Imants Lesinskis, testified that the true purpose of the "Committee for Cultural Relations of Latvians Abroad" was:

> "to promote discord among those communities, trying to isolate leaders of established Latvian organizations from their following" (Deposition at 4).

The "older generation was described as ... war criminals and servants of National Socialists." Books and articles were published containing "so-called documents [which] ... to my best knowledge they are all falsifications" (*Id.* at 5-6):

> "That was not only my belief or something like that. It was discussed in KGB circles in 1961, that such a book was a mistake because you really couldn't believe the excerpts of documents published there. They are unbelievable under any historical or political point of view. You can make different approach [sic] and they're [still] gross falsification" (*Id.* at 17).

The "Committee" of which he had been chairman had a counterpart in Estonia; both were directed by the "central committee," i.e., the Soviet Committee for Cultural Relations of Countrymen Abroad. He met members of the Estonian committee who told him that they were "actively working on the war criminal theme" and were publishing articles "on the involvement of Estonian nationalists in war crimes." The KGB continually directed these committees to make these accusations (*Id.* at 13-14).

One technique of Soviet propaganda was to take an emigre who had been in a unit fighting the Soviets and "put the person – from a fighting unit to an executioner squad" (*Id.* at 20).[19]

In a feeble attempt to overcome the evidence of forgery, the Government called **Michael Noblett**, an expert "questioned documents examiner" (Tr. 255-56). He admitted, however, that in attempting to determine the authorship of the signatures on GX 26-28 and 30 he had a "problem ... in ... that I had no contemporaneous known writing with which to compare these documents," and there were "inconsistencies" between the earlier signatures and the later "knowns"; consequently, the most that he could say was that there were "strong indications" petitioner signed the "concentration camp" papers (Tr. 270-74).

Noblett also testified that he had been given one hour by Russian Embassy personnel to examine the "originals" of all the purported foreign documents and he could *not* determine the age of the documents or the ink; he did not find any evidence of "underwriting" (Tr. 612).[20] On cross-examination he conceded that he had never examined any Soviet or Estonian documents from the 1940-43 period, and that he was not

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[19] All of the foregoing is in addition to the uncontradicted testimony concerning the sham nature of petitioner's alleged "conviction." See III, *supra*. If, as is clear, the Communists were willing to stage a phony trial to discredit petitioner, they would certainly be willing to provide forged documents for the same purpose.

[20] Since it was petitioner's contention that the *entire documents* were forgeries, the absence of "underwriting" is not dispositive of this issue.

familiar with the types of ink, paper, watermarks or typeface used in Estonia at that time (Tr. 664).[21]

Lest it be thought that these claims of forgery are limited to desparate defense lawyers or a fringe group of anti-Communist emigres, it should be noted that our own State Department has also documented numerous instances in which the Soviets forged various documents:

> "Soviet forgeries - completely fabricated or altered versions of actual documents - are produced and circulated to mislead foreign governments .... Recent Soviet forgeries are better and appear more frequently than in the past" (U.S. Department of State, Special Report, No. 88, Oct. 1981, at 2-3).

And former Representative John Ashbrook also has spoken out, on the floor of Congress, against the admission of Soviet "evidence" in alleged war crimes trials:

> "Soviet evidence is a fraud, should not be used in U.S. Courts.
>
> For the past few years, the U.S. Government has been searching for Nazi war criminals who may have come here after World War II. It is right that we should do this. We do not want war criminals in our country. But we must make sure that no innocent persons are wrongly accused. Evidence from Soviet sources is tainted by the Communist history of lies and forgeries.
>
> As the CIA told the House Intelligence Committee on February 6, 1980:
>
> > It is an established Soviet practice to employ forgeries in covert action and

[21] Because of the witness' inability to make a more positive finding, the District Court ruled that his testimony was "inconclusive and I can't consider it" (Tr. 274).

and psychological warfare operations against the United States.

Some 30 years ago the Soviet Government sent witnesses to Paris to perjure themselves at a trial to try to disprove the information on Soviet slave labor camps revealed by Victor Kravchenko. The French courts believed Kravchenko, not the Soviet perjurers. Forgeries and lies are the usual weapons of the Communists. To them these things are not violations of morality. As Lenin said, Communist morality is anything that advances Communist goals.

On May 10, 1981, the Washington Post printed a lengthy story on the ordeal of Frank Walus, who was falsely accused of being a Nazi war criminal. After spending $60,000 to defend himself, finally documents were found in the West German archives that proved that he could not have taken part on the atrocities. Witnesses who claimed to remember him, after more than 35 years, were clearly mistaken. They saw what they wanted to see. The face of the real criminal buried in the back of their minds became the face of the innocent Frank Walus.

This case ended well. Others may not. Soviet produced forgeries and false witnesses, used against refugees from communism because they are enemies of the Soviet regime would cause severe damage to innocent people.

We cannot condemn anyone based on Soviet evidence but we must make sure that no Nazi or Communist criminal should receive sanctuary here. We can be sure of this by using our basic American laws of evidence. Soviet evidence is tainted and should not be utilized in American courts."

127 Cong. Rec. H 2476-77 (daily ed. May 28, 1981).

And in *United States v. Walus*, 453 F.Supp. 699, 716 n. 13 (D.C. Ill. 1978), *rev'd.*, 616 F.2d 283, 297 (7th Cir. 1980), it was the *Government* which argued that certain foreign documents offered by the defendant had been *forged*.

This is not the first case in which "foreign documents" have been offered and/or admitted over objections similar to those raised here.

In *United States v. Demjanjuk*, 518 F.Supp. 1362 (D.C. Ohio 1981), a defense claim that such documents "were not authentic and ...[a] forgery" was rejected because "at no time during the entire course of the trial was *any* evidence introduced to substantiate these speculations" (*Id.* at 1366; emphasis in original).[22]

In view of the difficulties of either authenticating *or* discrediting documents allegedly forty to fifty years old, and in view of the potential for forgery demonstrated by the evidence in this trial, this Court should take this opportunity to establish some parameters for admitting or excluding such evidence.

One way in which this could be accomplished would be to mandate strict adherence to the requirements of F.R.C.P. 44(a) and F.R. Evid. 902(3) and (4). We now turn to this issue.

C. There was insufficient authentication under F.R.C.P. 44(a)(2) and F.R. Evid. 903 (3) and (4) which, insofar as relevant, read as follows:

> "Rule 44. Proof of Official Record. (a)Authentication.
>
> * * *
>
> (2) Foreign. A foreign official record, or an entry therein, when admissible for any purpose, may be evidenced by an official publication

[22] Needless to say, *Demjanjuk* is distinguishable from this case by virtue of the mass of evidence here supporting the claim of forgery.

thereof; or a copy thereof, attested by a person authorized to make the attestation, and accompanied by a final certification as to the genuineness of the signature and official position (i) of the attesting person, or (ii) of any foreign official whose certificate of genuineness of signature and official position relates to the attestation or is in a chain of certificates of genuineness of signature and official position relating to the attestation. A final certification may be made by a secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned to the United States."

"Rule 902. Self-authentication.

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

* * *

(3) Foreign public documents. A document purporting to be executed or attested in his official capacity by a person authorized by the laws of a foreign country to make the execution or attestation, and accompanied by a final certification as to the genuineness of the signature and official position (A) of the executing or attesting person, or (B) of any foreign official whose certificate of genuineness of signature and official position relates to the execution or attestation or is in a chain of certificates of genuineness of signature and official position relating to the execution or attestation. A final certification may be made by a secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular

official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of official documents, the court may, for good cause shown, order that they be treated as presumptively authentic without final certification or permit them to be evidenced by an attested summary with or without final certification.

(4) Certified copies of public records. A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification, by certificate complying with paragraph (1), (2) or (3) of this rule or complying with any Act of Congress or rule prescribed by the Supreme Court pursuant to statutory authority."

It is petitioner's contention that authentication under the foregoing statute was insufficient because (I) many of the documents were from one country but were accompanied by certifications from a *different* country and (II) the certifications themselves were defective and failed to comply with the statutes.[23]

(I) Copies of foreign documents must be certified by an official of the country from which the document *originated.*

GX 2-10 and 12-16 are purported copies of alleged *German* military records and correspondence; all of these materials, however, contain certifications by

[23] In addition, three of the documents (GX 22, 23 and 25) were improperly admitted because they were neither "public" nor "official", but were private records of petitioner's education. They were, however, of minor significance at the trial.

American or *Russian* officials. Similarly, although GX 11, 24, 26-28 and 30 are alleged *Estonian* military records, all are certified by *Russian* officials. In other words, the "foreign country" whose records these exhibits purport to be did not offer a shred of authentication thereof, either by a custodian or official of *that* country.

The Rules clearly contemplate the admission of the records of a foreign country only when some official of *that* country certifies its authenticity. See SMIT, *International Aspects of Federal Civil Procedure*, 61 Col. L. Rev. 1031, 1060-61, n. 131, 1062, 1065 (1961). The language of the Rules admits of no other interpretation. For example, a foreign record must be certified at some point by "a diplomatic or consular office of *the* foreign country" whose records are being offered (Rule 44(a)[2] and 902[3]). (*Cf.* Rule 44(a)(1) which requires certification of *domestic* records by an *American* official, and NYCPLR Section 4542 which provides for admission of a foreign document when attested and certified according to the law of "*such* foreign country"). This makes perfect sense because (a) only the custodian of the records of his own country would be able to attest to the genuineness of the signature and position of authority of the signatory on the original document and (b) only an official of the *same country* would be able to attest to the signature and "incumbency" of the custodian and/or the other signatories in the chain of certification (Notes of Advisory Committee on Rule 44 at 287). See, e.g., *Banco De Espana v. Federal Reserve Bank*, 114 F.2d 438, 446 (2d Cir. 1940): "The faith placed in certified copies of official records is ... based ... upon the assumption that the oath and certificate of the custodian may reasonably be relied upon." If the custodian was from another country, that assumption would be meaningless.

The foregoing issue does not appear to have been the subject of discussion in any of the reported cases on the subject.[24] See cases collected in Annot., Proof of Foreign Official Record Under Rule 44(a)(2) of Federal Rules of Civil Procedure, 41 ALR Fed. 777 (1979), all of which involve records and certifications of the *same* country.

However, the issue is bound to arise with greater frequency as OSI brings more and more prosecutions and attempts, as here, to introduce records of one country certified by another. See, e.g., *United States v. Demjanjuk, supra*, 518 F.Supp. at 1365-6 (admission of German records from Russian archives). Accordingly, the writ should issue.

(II) Assuming the certification was by the correct country, it still did not comply with the statutes.

Under F.R.C.P. 44(a)(2) and F.R. Evid. 902 (3) there are two conditions precedent to the admission of an original foreign document: (a) attestation (by the signatory or a foreign official) of the "genuineness of the signatures and official position" of the signatory, i.e., the "foundation" certification, and (b) "final" certification of the foregoing by a specified foreign official. In the case of a *copy*, Rule 902 (4) adds another "foundation" certification, i.e., attestation by the custodian that the copy is correct. 5 WEINSTEIN'S EVIDENCE paragraph 902(4)[01] at 902-30; SMIT, *International Aspects of Federal Civil Procedure, supra*, 61 Col. L. Rev. at 1060-61, 1063. See, also, 3 Jones *On Evidence*, Section 17:14 (Gard Ed., 1972): "To sustain admission in evidence of a copy of a document, it is essential that the copy be properly identified and connected with the original and that its accuracy and verity be established."

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[24] Cases, such as *Banco De Espana, supra* and this Court's decisions in *Shapleigh v. Mier*, 299 U.S. 468 (1937) and *Oakes v. United States*, 174 U.S. 778 (1899) do not resolve this issue; they merely stand for the proposition that a "successor" government may certify the authenticity of records of its predecessor. needless to say, Russia is *not* the successor government to the Republic of Estonia.

Since only *copies* were admitted into evidence, we are dealing with Rule 902(4). A perusal of several of the documents admitted here will demonstrate beyond question that they lacked the necessary certifications referred to therein.[25]

For example, GX26-28 and 30, documents purportedly signed by petitioner as head of the Tartu Concentration Camp, contain only a Xerox form which states:

> "This is certified by the Consular Division of the USSR Embassy that the seal and signature of the Soviet archivist are authentic and he has the right of the Soviet official to sign and stamp these documents.
>
> Vice Consul of the USSR Embassy
> A. Chuplygin."[26]

There is no reference, much less certification, to the "genuineness of the signature and official position" of the signatory of the documents of which these exhibits purport to be copies. There is no statement, much less certification, that anyone has custody of the originals, nor of when or by whom the alleged "copy" was made, nor that the alleged "copy" is accurate.[27]

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[25] Once again, it must be noted that counsel has requested that these exhibits be transmitted to this Court.

[26] The reference to the "seal and signature of the Soviet archivist" apparently refers to an untranslated stamp and undecipherable scrawl on the back of these documents. More will be said about this, *infra*.

[27] A comparison with the certification on one of the documents received from West Germany will highlight the defects in the Russian certification. For example, the certification of the custodian on GX 17 read as follows:

(footnote continued on following page)

The other "foreign" documents were similarly defective.

GX 11, a document purporting to appoint one "Karl Linnas' to a position in Security Cadre 41 "E" on May 23, 1942 contains only the form certifying to the unidentified archivist's signatore and authority. On the reserve of each page is certain untranslated writing which may refer to the date the copy was made - September 6, 1976. The fact that the name of the archivist does not appear in the form certification means that there is no way of knowing if the Soviet Consul actually knew of the "incumbency and genuineness of signature" of the person who signed it almost *five years earlier* (see Notes of Advisory Committee to Rule 44, at 287). In addition, although the source of this document is alleged to have been the archives of the *Estonian* SSR,

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(footnote continued from preceding page)

> "The agreement of the above photograph with the original, which is kept in the Patient Book Depository, Berlin, is hereby certified.
> (stamp: Patient Book Depository - Berlin)
> Gesch (/s/)
> Patient Book Depository, Berlin
> Manager
> Government Administrative Official
> 1000 Berlin 65, Jan. 23, 1981."

And the final certification of the foreign official reads:

> "CERTIFICATION
>
> I, Dirk von Haeften, Counselor to the Embassy of the Federal Republic of Germany in Washington, D.C., U.S.A., do hereby certify that Mr. Gesch, whose true signature and official seal are, respectively, subscribed and affixed to the attached instrument, was at the time of subscribing same an archivist of the Kraukenbuchlager at Berlin, Federal Republic of Germany, duly commissioned and by law authorized to attest to the genuineness of copies made of documents that are on file in the Archives of the Kraukenbuchlager, Berlin, and that his signature and official seal affixed thereto are genuine, and as such are entitled to full faith and credit.
>
> IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the Embassy of the Federal Republic of Germany in Washington, D.C., this 26 MAI [sic] 1981."

the seal next to the untranscribed words is the same as that on the certification by the Russian Consul and is presumably the seal of the *Russian* SSR. (See Subd. I, *supra*).

GX 15 and 16, letters purportedly referring to combat pay for one "Karl Linnas," contains only the form certification on the front and two untranslated seals and one unidentifiable scrawl on the reverse. They contain no reference to how, when, where or by whom they were copied.

GX 22-25, a high-school diploma, application for admission to Tartu University, military service record, and application for re-admission to Tartu University, all referring to one "Karl Linnas," contain only the form certification on the front and two untranslated seals and an unidentifiable scrawl on the reverse. They contain no reference to how, when, where or by whom they were copied.

Several other defects are present re: GX 11, 15-16, 22-25 and 30. Although the prosecutor *asserted* that these papers came from an *Estonian* archive, there is no *proof* of that. As noted previously, the seals on these documents have *not* been translated, nor does the alleged certification of the Russian Consul refer to the specific "Soviet" archive from which the documents purportedly come. Assuming that the unidentified scrawls on the reverse of these exhibits are supposed to be the signatures of a Soviet archivist, it must be noted that at least two different signatures appear (compare GX 11 to GX 15, and GX 26 to GX 27).

Under numerous decisions of the lower federal courts these documents should have been excluded because of failure to comply with the statute. Compare, e.g., *United States v. Leal*, 509 F.2d 122, 127 (9th Cir. 1975) (admission of copy of foreign record proper where custodian attested to accuracy of copy and contents thereof). The Second Circuit's statement that such attestation and certification constituted "unnecessary

procedural requirements" (Appx. A, *infra*, at 3a) puts it in clear conflict with these other federal courts. In addition, it does not appear that this Court has ever dealt with the important federal issue of the standards for admission of copies of foreign documents under Rules 44(a)(2) and 903(4). For all of these reasons, the writ should issue.

V

The Determination of Standards for Admission of Foreign Depositions in Denaturalization Proceedings Is an Important Issue of Federal Law Which Should Be, But Has Not Been, Decided by This Court.

Pursuant to Rule 26(b)(1) of the Federal Rules of Civil Procedure, defense counsel sought to depose three persons who were the purported presiding judge, prosecutor and defense counsel at petitioner's alleged trial in Estonia in 1962. The purpose was to "learn of the manner in which the government's proposed [deposition] witnesses [who had testified at the earlier trial] have been picked by the Soviets ... for their testimony" (Mins. 10/3/80 at 40). It was defense counsel's position that the witnesses the prosecutor was going to depose were unworthy of belief because they had been "scripted" by the Soviets to give false testimony. And this position was not without support, as defense witnesses at the subsequent trial testified that they knew from personal experience in the Soviet legal system that judges and prosecutors threatened witnesses to testify in a certain way.

Dr. Tonu Parming testified that "testimony appears to have been forged" in several recent Soviet trials of alleged war criminals (Tr. 460), and, as noted previously, he testified in great detail to the "sham" nature of the "conviction" obtained in this case (Tr. 443-5).

Melbourne Hartman testified that the Soviets had "forged and fabricated" testimonial evidence in the 1930's "purge" trials (Tr. 596-7).

Frederick Neznansky testified that:

> "Witnesses are indeed trained to testify according to the wishes of the prosecution.
>
> * * *
>
> Sometimes witnesses are threatened in a more serious way of being accused of perjury, threatened with being accused of complicity in the given crime.
>
> And evidence is also falsified on occasion. For example, a witness ... will be bothered sufficiently enough to change his testimony in the desirable way eventually ... For example, ... a judge would call me sometimes and tell me, you sent us this witness and he changed his testimony in court .... We will recess the court for a couple of days. Could you work him over a little bit more. So call the witness back and make him change his testimony.
>
> From the experience of my colleagues and people I know in the KGB, sometimes they falsified the transcript of a witness' testimony" (Tr. 639-41).

Judges and prosecutors would "tamper" with trials because "The real judge and prosecutor in the Soviet Union is the Politboro of the Communist Party" (Tr. 642).

Imants Lesinskis, testifying via deposition, said that on behalf of the Latvian Committee for Cultural Relations of Latvians Abroad he had attended a trial of alleged war criminals in 1965 and

> 'I had some legal training for four years and I was offended in just looking at that kind of trial where the procedures, the witnesses – many of the testimonies seemed to be heavily biased ..." (Dep. at 10).

The reason the Soviets would not allow witnesses to come to the United States to testify is they are "afraid to leave common people out of [sic] KGB instructions .... Any witness knows that the ... KGB is considered the most dreaded organization in the Soviet Union and ... they are, to the best of my knowledge, intimidated ..." (*Id.* at 16).

He said it was "highly improbable" that witnesses the Soviets present in war crimes trials are reliable (*Id.* at 22). The KGB would have "no qualms" about training witnesses to give false testimony in the Soviet Union for use in a trial in the United States (*Id.* at 23).[28]

Defense counsel also moved, pursuant to Rule 26(c), for a protective order concerning the depositions noticed by the prosecution. Essentially, he asked for removal of the depositions to a non-Communist country and, failing that, for the imposition of conditions which would produce "fair and trustworthy" proceedings.

Defense counsel's affirmation in support of his motion for the protective order amply demonstrated good cause to believe that depositions conducted within the Soviet Union and/or under the control of Soviet officials would not comport with "justice." As a matter of fact, at the hearing on this motion the District Court seemed to agree with defense counsel's position and suggested that the depositions be taken in an American Consulate; however, the prosecutor reminded the court that there was no American Consulate in Estonia[29] and,

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[28] Once again it must be recalled that the witnesses at the 1962 sham trial were the same witnesses deposed in this case.

[29] Because this country never recognized the Russian take-over of that country.

in any event the Soviets "require the entire proceeding take place on Soviet soil" (Mins. 10/3/80 and 5-6).[30]

The prosecutor conceded that the State interfered in and influenced the outcome of trials, such as those involving alleged war criminals, in which it had an interest (Tr. 639). And the District Court said:

> "I find that the Soviet judicial system for these purposes, for this trial, is unfair, that testimony is contrived, that the Politboro manipulates the courts" (Tr. 643).

Despite this, and without explanation, both the motion to depose defense witnesses and the motion for a protective order were denied (see Appx. F, *infra*, at 18a, and Mins. 10/3/80 at 24-25, "My rulings are subject to the Criminal Code of the Soviet Union. I can't override that").[31]

At the October 3 hearing, defense counsel had also requested that the prosecution be directed to pay him a reasonable attorney's fee, plus expenses, in order to enable him to attend the prosecutor's depositions in Estonia, because petitioner was unable to bear this expense. The prosecutor agreed and an order to this effect was entered on October 8 (Mins. 1 /3/80 at 16-22 and Appx. E, *infra*, at 15a-16a).

Shortly thereafter, defense counsel informed the court that petitioner "reluctantly" would not comply with the court's prior order ruling that petitioner had no Fifth Amendment privilege and had to answer the prosecutor's interrogatories. The prosecutor then moved for an order treating the facts contained in the

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[30] A defense witness subsequently testified that the Soviets never let witnesses testify outside the Soviet Union because that would remove them from the influence of the KGB (Lesinskis' deposition at 16).

[31] The Court of Appeals affirmed these denials with the unilluminating observation that "Judge Mishler did not abuse his discretion in rejecting [petitioner's] motions to depose Soviet officials and to have depositions taken outside the Soviet Union" (Appx. A, *infra*, at 4a).

unanswered interrogatories as established, alleging that the cost of establishing these facts would be approximately $20,000. By Memorandum dated October 24, 1980 the District Court granted the prosecutor's motion; in addition however, and hidden in a footnote and apparently *sua sponte*, the court reversed its prior position and ruled that *petitioner* would have to pay for *his* counsel to attend the prosecutor's Estonian depositions. (See Appx. G, *infra*, at 21a.) As a result, counsel could not attend these depositions and they were conducted in his absence.[32]

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[32] The Court of Appeals upheld this deprivation of the right to counsel on the ground that petitioner did not "demonstrate that he was so indigent that the government should bear his attorney's costs in attending the depositions. Hence, Judge Mishler did not abuse the wide discretion ordinarily accorded a trial judge in refusing to subsidize such expenses" (Appx. A, *infra*, at 4a). The record established that petitioner did establish his inability to pay his counsel's fees and expenses.

At a pre-trial hearing on an unrelated matter, defense counsel objected to the prosecutor's repeated requests for "status conferences" because these required defense counsel's presence and constituted an additional expense to a client who was then only "one notch above legal aid" (Mins. 7/8/80 at 4); the Government did not dispute this statement.

Several months later when the issue of defense counsel attending the Estonian depositions arose, counsel requested that the lower court direct the Government to pay his expenses and fees for attending those depositions ("I can't do it if the client cannot scrape up the kind of money that it takes" [Mins. 10/3/80 at 19]).

The Government indicated that expenses and counsel fees had been paid in similar situations and the court directed defense counsel to file an affidavit formally requesting such relief (*Id.* at 17-18, 20-23).

Even after the court ruled that petitioner would have to pay for his counsel to attend the Government's depositions, defense counsel made one last attempt to salvage petitioner's right to be represented thereat. He asked the Government to schedule the depositions in this case at the same time as two other depositions he had to attend nearby, but the motion was denied without explanation.

It was only *after* this last denial that defense counsel had to inform the court that he could not attend the depositions.

(footnote continued on following page)

As a direct result of the District Court's actions, the depositions in Estonia were conducted *ex parte* by only the Soviet and American prosecutors. The results of this collaboration are predictably squalid: both the procedures under which the depositions were taken, and the content thereof, did not comport with fundamental due process.

None of the witnesses was placed under oath, although this is a prerequisite to truthfulness in any Western court.

Each witness was directed by the Soviet procurator to give testimony against the "Fascist war criminal" or "Fascist prisoner murder[er]."

It must also be noted that each of these witnesses was first questioned by the *Soviet* prosecutor, thus "freezing" his testimony, and this testimony was then merely repeated and expanded upon for the American questioner. See and compare, e.g., GX 18-A (Deposition of Art) at 3-10 (questions by Soviet prosecutor) with *id.* at 11-40).[33]

The deposition of one witness (Hans Laats) should not have been considered at all as the witness admitted that he had "brain damage" and his memory "did not work so well." The deposition of another witness (Elmar Puusepp) also should not have been considered since the witness never identified petitioner as the person whose actions he had described at the camp (see GX 21-A).

The depositions of the others were hopelessly inconsistent and contradictory.

(footnote continued from preceding page)

It is clear that the foregoing establishes petitioner's inability to pay for the attendance of his counsel at the Government's depositions. As one writer on the subject has put it:

> "The cases vividly portray the hardships of a defendant who might be without funds ... to pay for an extensive undertaking during discovery ... [and it] follows that all needy defendants in denaturalization suits should be provided with ... Government funds to adequately prepare for their defense" *Denaturalization, etc., supra*, 40 Md. L. Rev. at 75.

[33] We have requested that these depositions be sent to this Court.

Art first said he did *not* see petitioner at any of the executions at the anti-tank ditch; then he said that although he was still "not ... 100 percent sure ... [he] finally added that on one occasion he [petitioner] was there (GX 18-A at 27, 36-37). In considering testimony such as this, one would be well-advised to recall the testimony of Frederick Neznansky that "Witnesses are indeed trained to testify according to the wishes of the prosecution" and "Sometimes witnesses are threatened in a more serious way ..." (Tr. 639-41) and that of Imants Lesinskis that it was "highly improbable" that witnesses presented by the Soviets are reliable because the KGB would have "no qualms" about training witnesses to give false testimony in the Soviet Union for use in a Western trial.

Art said petitioner left the camp in mid-1942 (GX 18-A at 35), whereas Puusepp said the man he knew as "Linnas" was there until 1944 (GX 21-A at 34). Karikosk said that after he told the man who was so trusted by the Germans he ran their concentration camp, that he wanted to avoid going to the front, that man graciously gave him a job in the camp (GX 20-A at 9).[34]

Many of the issues raised in this context are similar to those raised in the context of the alleged foreign documents, and much of what was said there is relevant here.

The record clearly establishes the general proposition that the Soviet Government, which controls Estonia, has forced witnesses to give false testimony when it suited the interest of that Government; the

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[34] Although "disturbed" by the actions of the Soviet procurator at these depositions, the District Court still admitted them and considered them as "supportive and corroborative" of other evidence (Appx. H, *infra*, at 37a).

The Court of Appeals affirmed on the ground that "any procedural deficiencies in taking the depositions and any inconsistencies in the deponent's testimony went to the weight rather than the admissibility of the evidence. Judge Mishler adequately took these factors into account in reaching his decision" (Appx. A, *infra*, at 4a).

Our position, of course, is that the procedures surrounding the depositions rendered them inadmissible *at all*.

prosecutor so conceded and the District Court so held. The record equally establishes that this is precisely what the Soviets have already done once to petitioner, i.e., at the sham trial in 1962. That being the case, it was a clear abuse of discretion for the District Court to deny petitioner the right to depose the officials involved in that trial and/or to deny petitioner the right to have depositions of the witnesses from that trial held under circumstances calculated to prevent a repetition of that trial, i.e., to deny petitioner the right to demonstrate that the Soviets were using the American courts to do the *same thing again!*

As demonstrated in II and III, *supra*, petitioner *had* the right to assert the privilege against self-incrimination, contrary to the District Court's ruling. But respondent has contended that even if the District Court erred in ruling petitioner had no privilege, it was permissible to impose a sanction on him, i.e., that he had to pay for his attorney's attendance at the Government's depositions, for asserting it. The issue of whether a denaturalization defendant may be punished for asserting a valid privilege has never been decided by this Court (*Cf. Costello v. United States, supra*), and the issue of whether the kind of sanction imposed here was valid is also open. See, e.g., *United States v. Kowukchuk, supra*, Slip Op. at 11: "there is substantial doubt as to the propriety of imposing any ... sanctions in a denaturalization proceeding."

Last but not least, the admission of depositions taken in the absence of counsel and the accused, and under the conditions described above, raises serious questions about the proper administration of justice in American courts. And this is particularly so when the subjects of these depositions are acts allegedly committed over 40 years ago and identifications of similar antiquity. As one commentator put it,

> "Critics have observed that survivor testimony is unreliable because survivors suffer from

> 'hyper-amnesia' - remembering events in great detail which never occurred or which never occurred quite how they were remembered." *(Denaturalization, etc., supra,* 40 Md. L. Rev. at 77 n. 172.[35]

The issues which are present in these cases have arisen in other denaturalization cases. See, e.g., *Federenko v. United States, supra* (deposition of defense and government witnesses, and paying defense attorneys' expenses); *United States v. Walus, supra* (same, plus misidentification). And they will continue to arise. See 97 Cong. Rec. E 690, 693-7 (listing pending prosecutions involving foreign depositions). Accordingly, the writ should issue.

Conclusion

For the above-stated reasons, the petition for a writ of certiorari should be granted and the judgments of the Court of Appeals and District Court reversed.

Respectfully submitted,

IVARS BERZINS, ESQ.
Attorney for Petitioner
484 W. Montauk Highway
Babylon, New York 11702
(516) 661-3540

Joel A. Brenner,
Of Counsel

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[35] *Cf.* Justice Stevens dissenting in *Federenko v. United States, supra,* 449 U.S. at 538:

> "The gruesome facts recited in this record create what Justice Holmes described as a sort of 'hydraulic pressure' that tends to distort our judgment."

APPENDICES

Appendix A
Opinion of United States Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 25th day of January, one thousand nine hundred and eighty-two.

Present:

HONORABLE WILFRED FEINBERG
Chief Judge
HONORABLE WALTER R. MANSFIELD
HONORABLE AMALYA L. KEARSE
Circuit Judges

81-6165

UNITED STATES OF AMERICA,

Appellee,

- v. -

KARL LINNAS,

Appellant.

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

Appendix A
Opinion of United States Court of Appeals

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the judgment of said District Court be and it hereby is AFFIRMED.

Karl Linnas appeals from a judgment of the United States District Court for the Eastern District of New York entered on July 30, 1981 after a trial before Jacob Mishler, J. The judge ordered revocation of appellant's certificate of naturalization under section 340(a) of the Immigration and Nationality Act (INA), 8 U.S.C. § 1451(a), because it was "illegally procured" and because it was "procured by concealment of a material fact or by willful misrepresentation." The judgment of the district court has been stayed pending this appeal.

The government sought to denaturalize appellant on a number of grounds. In Count I of its complaint, the government alleged that appellant was never lawfully admitted into the United States as required by section 316(a)(1) of the INA, 8 U.S.C. § 1427, because his activities as a Nazi concentration camp guard during World War II precluded him from entering the country under the Displaced Persons Act of 1948 (DPA), Pub. L. No. 80-774, ch. 647, 62 Stat. 1009 (1948), and because his willful misrepresentations under the DPA made him ineligible for admission. Under Counts II and III, the government sought appellant's denaturalization on the ground that during naturalization proceedings of 1960, he procured his citizenship by concealment or misrepresentation of facts material to his eligibility for citizenship. In particular, the government alleged that contrary to appellant's sworn statements, he had committed crimes of moral turpitude and was not a person of good moral character. Count IV alleged that appellant's citizenship was illegally procured because he in fact was not of good moral character. Count V alleged that as a matter of statutory law, appellant

was not a person of good moral character because he had given false testimony to obtain benefits under the INA in violation of section 101(f)(6) of the INA, 8 U.S.C. § 1101(f)(6).

In a thorough and carefully reasoned opinion, dated July 30, 1981, Judge Mishler endorsed all of the grounds for denaturalization proffered by the government. We affirm essentially for the reasons set forth in the district court's opinion, although a few matters require elaboration. First, appellant argues that he was deprived of due process and a fair trial because he was denied his privilege against self-incrimination. As indicated in several memoranda preceding his July 30 opinion, Judge Mishler consistently rejected appellant's fifth amendment claim in the context of denaturalization proceedings. In his July 30 decision, however, Judge Mishler expressly disavowed reliance on any adverse inferences drawn from appellant's refusal to testify. Under the circumstances, this exclusive reliance on independent evidence mooted any fifth amendment claim appellant might have.

Appellant also contends that numerous documents were improperly admitted into evidence because they did not comply with various federal rules, including Fed. R. Civ. P. 44(a)(2) and Fed. R. Evid. 902(3), (4). Because appellant failed to raise in the trial court the specific objections made here, he has waived these claims. 5 J. Weinstein & M. Berger, Weinstein's Evidence Para. 902(3)[01](1978). Moreover, these materials complied with the requirements of the federal rules, especially since the rules were "designed to meet the practical problems in obtaining properly authenticated documents from abroad by abolishing all unnecessary procedural requirements," id.

Finally, appellant challenges the admissibility of various foreign depositions. These contentions must

also be rejected. Judge Mishler did not abuse his discretion in rejecting appellant's motions to depose Soviet officials and to have depositions taken outside the Soviet Union. Nor did appellant demonstrate that he was so indigent that the government should bear his attorney's costs in attending the depositions. Hence, Judge Mishler did not abuse the wide discretion ordinarily accorded a trial judge in refusing to subsidize such expenses. Finally, any alleged procedural deficiencies in taking the depositions and any inconsistencies in the deponents' testimony went to the weight rather than the admissibility of the evidence. Judge Mishler adequately took these factors into account in reaching his decision.

We have considered all of apellant's arguments and they are without merit. We affirm the judgment of the district court.

/s/ _____
WILFRED FEINBERG,
Chief Judge

/s/ _____
WALTER R. MANSFIELD,

/s/ _____
AMALYA L. KEARSE,
Circuit Judges.

Appendix B
Order of United States Court of Appeals on Petition for Rehearing and Suggestion for Rehearing En Banc

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the fifth day of April, one thousand nine hundred and eighty-two.

No. 81-6165

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

KARL LINNAS,
Defendant-Appellant.

A petition for rehearing containing a suggestion that the action be reheard in banc and a letter with supplemental authorities having been filed herein by counsel for the defendant-appellant, Karl Linnas,

Upon consideration by the panel that heard the appeal, it is

ORDERED that said petition for rehearing is DENIED.

Appendix B
Order of United States Court of Appeals on Petition for Rehearing and Suggestion for Rehearing En Banc

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon.

/s/ _____

A. Daniel Fusaro
Clerk

by Francis X. Gindhart
Chief Deputy Clerk

Appendix C
Decision and Order of United States District Court Dated August 14, 1980

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

---

79 C 2966

UNITED STATES OF AMERICA,

Plaintiff,

-against-

KARL LINNAS,

Defendant.

Memorandum of Decision and Order
August 14, 1980

APPEARANCES:

HONORABLE EDWARD R. KORMAN
UNITED STATES ATTORNEY
EASTERN DISTRICT OF NEW YORK
225 Cadman Plaza East
Brooklyn, New York 11201
Leonard A. Sclafani,
Assistant United States Attorney

IVARS BERZINS, ESQ.
Attorney for Defendant
484 West Montauk Highway
Babylon, New York 11702

MISHLER, District Judge

Plaintiff moves pursuant to Rule 12(f) of the Federal Rules of Civil Procedure for an order striking the defendant's affirmative defenses. For the reasons

set forth below the motion is granted.

In this action plaintiff, the United States of America, seeks to have the defendant's citizenship revoked on the grounds that it was unlawfully obtained. The government claims that the defendant actively persecuted civilian populations at a concentration camp in Estonia during World War II and that the defendant failed to disclose this information as required by law when he applied for his immigration visa to the United States, and again when he applied for United States citizenship. It is alleged that neither the immigration visa nor the certificate of naturalization would have been granted if the disclosures had been made.

Defendant asserts as affirmative defenses that:

1. The action is "part and parcel of an invidious program of politically motivated selective persecution which violates defendant's constitutional rights to due process and equal protection of the law;"

2. The action is barred by laches;

3. Plaintiff is estopped from bringing this action because "it had a full and fair oppoprtunity to investigate and determine defendant's qualifications for citizenship before United States citizenship was granted him."

Discussion

The defendant's first affirmative defense is a bare averment, plainly insufficient on its face. The second affirmative defense of laches is not available here, where it is asserted against the government, and the party can show no resulting prejudice. *Cf. Costello v. United States*, 365 U.S. 265, 81 S.Ct. 534 (1961). The defendant's third affirmative defense must also be stricken. The government is not estopped from bringing this action since the defendant's alleged

misrepresentations would have deprived the government of a full and fair opportunity to investigate and determine the defendant's qualifications for citizenship before it was granted. *Knauer v. United States*, 328 U.S. 654, 66 S.Ct. 1304 (1946).

Conclusion

The plaintiff's motion to strike the defendant's affirmative defenses is granted.

SO ORDERED.

/s/ _____

U. S. D. J.

Appendix D
Decision and Order of United States District Court Dated September 24, 1980

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

---

79 C 2966

UNITED STATES OF AMERICA,
Plaintiff,

-against-

KARL LINNAS,
Defendant.

Memorandum of Decision and Order
September 24, 1980

APPEARANCES:

HONORABLE EDWARD R. KORMAN
UNITED STATES ATTORNEY
EASTERN DISTRICT OF NEW YORK
225 Cadman Plaza East
Brooklyn, New York 11201
Leonard Sclafani,
Assistant United States Attorney,
Of Counsel

Appendix D
Decision and Order of United States District Court Dated September 24, 1980

OFFICE OF SPECIAL INVESTIGATIONS
CRIMINAL DIVISION
DEPARTMENT OF JUSTICE
P.O. Box 28603
Washington, D.C. 20005
Rodney G. Smith, Trial Attorney
Martha Talley, Trial Attorney

IVARS BERZINS, ESQ.
Attorney for Defendant
484 West Montauk Highway
Babylon, New York 11702

MISHLER, District Judge

The government moves pursuant to F.R.C.P. 37(a) to compel the defendant to answer fully interrogatories numbered five, six and eight through thirty-one which the government served on defendant on April 22, 1980 and to produce the documents requested in those interrogatories. The government further requests the court to extend the government's time to answer defendant's interrogatories pursuant to F.R.C.P. 6(b). The defendant asserts his Fifth Amendment right against self-incrimination in his refusal to answer the interrogatories.

The action seeks the denaturalization of the defendant pursuant to § 304(a) of the Immigration and Nationality Act of 1952, 8 U.S.C. § 1451 (a). The government alleges that defendant in May 1951 illegally procured United States citizenship under the Displaced Persons Act of 1948, Pub. L. No. 774 (62 Stat. 1009), by knowingly misrepresenting to an examiner certain facts required for naturalization under 42 U.S.C. § 1427(a)(1) and concealing information material to his application for citizenship and, thereafter, in May 1951, executing a document in which he

swore that he was a displaced person as defined by law. It is alleged that defendant failed to disclose his participation in the persecution of inmates of a concentration camp in Tartu, Estonia during World War II and instead stated that he was a civilian during the period from June 1940 through May 1943 and was not involved with and did not have membership in any military or political group. He further stated that he never advocated or assisted in the persecution of any person because of race, religion or national origin. He thus became eligible as a displaced person under the Displaced Persons Act for a visa.

The complaint alleges that defendant commanded the Tartu concentration camp during all or part of the period from August 1941 to May 1943 or was a member of the security forces of said concentration camp. It states that defendant removed men, women and children from barracks at the camp and transferred them to an execution site, and that he personally participated in the execution and physical abuse of prisoners. Linnas was convicted and sentenced to death *in absentia* in Estonia on June 20, 1962 for crimes committed at the Tartu concentration camp.

Defendant claims a Fifth Amendment privilege against answering the interrogatories or requests for documents relating to events prior to his entry into the United States. The court has carefully examined all defendant's arguments in support of the Fifth Amendment claim. The conviction of defendant of June 20, 1962 resolves the issue of the existence of a privilege. "It is well established that once a witness has been convicted for the transactions in question he is no longer able to claim the privilege of the Fifth Amendment and may be compelled to testify." *United States v. Hoffman*, 385 F.2d 501, 504 (7th Cir. 1967), *cert. denied*, 390 U.S. 1031, 88 S.Ct. 1424 (1968) (citing

United States v. Romero, 249 F.2d 371 (2d Cir. 1957)). The result in *United States v. Maikovskis*, No. M18-304 (S.D.N.Y. March 10, 1978), *aff'd without opinion*, 584 F.2d 974 (2d Cir. 1978), also dictates the rejection of the Fifth Amendment privilege. In *Maikovskis*, Judge Motley rejected the assertion of the Fifth Amendment privilege against self-incrimination by a witness who had been sentenced to death *in absentia* in Latvia and directed him to testify as to those matters on which he was convicted.

Order

Plaintiff's motion is in all respects granted.

Defendant shall fully and completely answer interrogatories five, six and eight through thirty-one and produce the documents requested at the office of the United States Attorney, c/o Assistant United States Attorney Leonard Sclafani, 225 Cadman Plaza East, Brooklyn, New York on or before October 14, 1980. The plaintiff's time to serve and file answers to defendant's interrogatories is extended to and including October 27, 1980.

SO ORDERED.

/s/ _____

U. S. D. J.

Appendix E
Decision and Order of United States District Court Dated October 8, 1980

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

---

79 C 2966

UNITED STATES OF AMERICA,
Plaintiff,

-against-

KARL LINNAS,
Defendant.

Memorandum of Decision and Order
October 8, 1980

APPEARANCES:

HONORABLE EDWARD R. KORMAN
UNITED STATES ATTORNEY
EASTERN DISTRICT OF NEW YORK
225 Cadman Plaza East
Brooklyn, New York 11201
Leonard Sclafani,
Assistant United States Attorney,
Of Counsel

Appendix E
Decision and Order of United States District Court Dated October 8, 1980

OFFICE OF SPECIAL INVESTIGATIONS
CRIMINAL DIVISION
DEPARTMENT OF JUSTICE
P.O. Box 28603
Washington, D.C. 20005
Rodney G. Smith, Trial Attorney
Martha Talley, Trial Attorney

IVARS BERZINS, ESQ.
Attorney for Defendant
484 West Montauk Highway
Babylon, New York 11702

MISHLER, District Judge

All the relief for which defendant prayed in notice of motion dated September 28, 1980 is denied, except as follows:

Paragraph 7: If, after the completion of the depositions and upon his return to the United States, defendant challenges the accuracy of the translation of the Estonian interpreter appointed by the Soviet Government, defendant is authorized to appoint an interpreter at the cost and expense of the plaintiff.

Paragraphs 11 and 12: Defendant's counsel is awarded a reasonable attorney's fee for services reasonably necessary in the representation of defendant at the depositions of witnesses in the offices of the Procurator General of the Estonian Soviet Socialist Republic in Tallin or elsewhere in the U.S.S.R. on or about and subsequent to October 23, 1980 in addition to travel expenses and sustenance at the rates established by the Department of Justice. Defendant's attorney shall make formal application for fixing

a reasonable attorney's fee upon completion of the services relating to the depositions.

SO ORDERED.

/s/ _____

U. S. D. J.

Appendix F
Decision and Order of United States District Court Dated October 8, 1980

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

---

79 C 2966

UNITED STATES OF AMERICA,
Plaintiff,

-against-

KARL LINNAS,
Defendant.

Memorandum of Decision and Order
October 8, 1980

APPEARANCES:

HONORABLE EDWARD R. KORMAN
UNITED STATES ATTORNEY
EASTERN DISTRICT OF NEW YORK
225 Cadman Plaza East
Brooklyn, New York 11201
Leonard Sclafani,
Assistant United States Attorney,
Of Counsel

Appendix F
Decision and Order of United States District Court Dated October 8 1980

OFFICE OF SPECIAL INVESTIGATIONS
CRIMINAL DIVISION
DEPARTMENT OF JUSTICE
P.O. Box 28603
Washington, D.C. 20005
Rodney G. Smith, Trial Attorney
Martha Talley, Trial Attorney

IVARS BERZINS, ESQ.
Attorney for Defendant
484 West Montauk Highway
Babylon, New York 11702

MISHLER, District Judge

Defendant's motion to depose P. Afanasjev, K. Kimmel and Imar Rebane, respectively, the presiding judge, prosecuting attorney and defense attorney in the trial charging the defendant with a violation of Soviet Criminal Law is in all respects denied, and it is

SO ORDERED.

/s/ _____
U. S. D. J.

Appendix G
Decision and Order of United States District Court Dated October 24, 1980

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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78 C 2966

UNITED STATES OF AMERICA,
Plaintiff,

-against-

KARL LINNAS,
Defendant.

Memorandum of Decision and Order
October 24, 1980

APPEARANCES:

HONORABLE EDWARD R. KORMAN
UNITED STATES ATTORNEY
EASTERN DISTRICT OF NEW YORK
225 Cadman Plaza East
Brooklyn, New York 11201
Leonard Sclafani,
Assistant United States Attorney,
Of Counsel

Appendix G
Decision and Order of United States District Court Dated October 24, 1980

OFFICE OF SPECIAL INVESTIGATIONS
CRIMINAL DIVISION
DEPARTMENT OF JUSTICE
P.O. Box 28603
Washington, D.C. 20005
Rodney G. Smith, Trial Attorney
Martha Talley, Trial Attorney

IVARS BERZINS, ESQ.
Attorney for Defendant
484 West Montauk Highway
Babylon, New York 11702

MISHLER, District Judge

The order of this court dated September 24, 1980 directed the defendant to fully and completely answer the government's interrogatories on or before October 14, 1980. On October 10, 1980, defendant advised the court that he would not comply with the court's order. The government now moves for an order directing " . . . that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim . . . ." F.R.C.P. 37(b)(2)(A) as incorporated in F.R.C.P. 37(d).

Discussion

The court's power to declare facts that might have been established through answers to interrogatories be deemed established is found in Rule 37(d) and supported in case law. *Campbell v. Eastland*, 307 F.2d 478 (5th Cir.), *cert. denied*, 371 U.S. 955, 83 S.Ct. 502 (1962), *Black v. United States*, 389 F.Supp. 529 (D.C.), *reversed on other grounds*, 564 F.2d 531 (D.C. Cir. 1975).

Appendix G
Decision and Order of United States
District Court Dated October 24, 1980

The proceeding is instituted pursuant to § 1304(a) of the Immigration and Nationality Act of 1952, 8 U.S.C. § 1451(a) to revoke the United States citizenship of the defendant granted under the Displaced Persons Act of 1948, Pub. L. No. 774 (62 Stat. 1009). Though classified as a civil action, the consequences of denaturalization may result in "an extraordinary severe penalty." *Klapprott v. United States*, 335 U.S. 601, 612, 69 S.Ct. 384, 389 (1949). Therefore, significant distinctions are noted between the usual civil suit and a denaturalization proceeding.[1]

The government represented that the cost of procuring the information that should be available in the answers to interrogatories is in excess of $20,000.[2] The government offered to provide the defendant with affidavits in support of the facts it seeks to establish in the motion. Because of the nature of the proceeding, the court will afford defendant the opportunity of deposing the affiants.[3]

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[1] In *Klapprott*, Mr. Justice Douglas wrote:

> ". . . a burden rests on the government to prove its charges in such cases by clear, unequivocal and convincing evidence which does not leave the issue in doubt. *Schneiderman v. United States*, 320 U.S. 118, 158, 63 S.Ct. 1333, 1352, 87 L.Ed. 1796. This burden is substantially identical with that required in criminal cases–proof beyond a reasonable doubt." *Id.* U.S. at p. 162, S.Ct. at p. 389.

[2] The government had made contingent arrangements to depose witnesses in Estonia that it believes would establish the facts. The court's decision of September 24, 1980 provided for the payment of attorney's fees and expenses in the event the depositions were conducted.

[3] Each party shall share their own costs. The government shall make all the arrangements for the depositions as outlined in open court on October 3, 1980.

Appendix G
Decision and Order of United States
District Court Dated October 24, 1980

The motion is granted. It is ordered that the following facts are deemed established beyond a reasonable doubt unless the defendant at the trial offers evidence to the contrary.

Appendix H
Decision and Order of United States District Court Dated July 30, 1981

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

---

79 C 2966

UNITED STATES OF AMERICA,

Plaintiff,

-against-

KARL LINNAS,

Defendant.

Memorandum of Decision and Order
July 30, 1981

APPEARANCES:

HONORABLE EDWARD R. KORMAN
UNITED STATES ATTORNEY
EASTERN DISTRICT OF NEW YORK
225 Cadman Plaza East
Brooklyn, New York 11201
Leonard Sclafani,
Assistant United States Attorney,
Of Counsel

Appendix H
Decision and Order of United States District Court Dated July 30, 1981

OFFICE OF SPECIAL INVESTIGATIONS
CRIMINAL DIVISION
DEPARTMENT OF JUSTICE
P.O. Box 28603
Washington, D.C. 20005
Rodney G. Smith, Trial Attorney
Martha Talley, Trial Attorney

IVARS BERZINS, ESQ.
Attorney for Defendant
484 Montauk Highway
Babylon, New York 11702

MISHLER, District Judge

The United States of America commenced the instant action on November 21, 1979 pursuant to the Immigration and Nationality Act of 1952, as amended, 8 U.S.C. §1451(a), to revoke the Certificate of Naturalization (No. 7641679) of defendant, Karl Linnas, and to vacate the order of the New York Supreme Court (Suffolk County) admitting defendant to United States citizenship. The Government seeks to upset defendant's naturalization obtained in February of 1960 on the theories that his citizenship was (1) "illegally procured" and (2) "procured by concealment of the material fact or by willful misrepresentation." Either of these theories, if proven by " 'clear, unequivocal, and convincing' " evidence which does not leave " 'the issue in doubt,' " *Schneiderman v. United States*, 320 U.S. 118, 125 (1943) (quoting *Maxwell Land Grant Case*, 121 U.S. 325, 381 (1887)),[1] would provide the court with no alternative but to enter judgment of denaturalization against defendant. *Fedorenko v. United States*, ___ U.S. ___, 101 S.Ct. 737, 352-53 (1981).

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[1] The Supreme Court has recently reaffirmed the applicability of the heavy burden of proof which is placed on the Government when it attempts to revoke an individual's citizenship. *Fedorenko v. United States*, ___ U.S. ___, 101 S.Ct. 737, 747 (1981).

Appendix H
Decision and Order of United States District Court Dated July 30, 1981

The Government's case turns on the legality of defendant's entry into this country in 1951 under the Displaced Persons Act of 1948, Pub.L.No. 80-774, ch. 647, 62 stat. 1009, as amended (the "DPA"). The Government's five-count complaint alleges, *inter alia*, various heinous acts on the part of defendant during his residence in Tartu, Estonia between August 1941 and May 1943. In Count 1, the Government alleges that defendant was never lawfully admitted into the United States, a condition precedent for naturalization under Section 316 (a)(1) of the Immagration and Nationality Act, 8 U.S.C. §1427, because (1) his activities during World War II precluded him from obtaining lawful entrance into the United States as an eligible person under the DPA, and (2) his willful misrepresentations made for "the purpose of gaining admission into the United States" under the DPA made him ineligible for admission under the Act. Counts II and III seek defendant's denaturalization based on the contention that his citizenship was procured by the concealment or misrepresentation of facts material to his eligibility for citizenship during the process leading to his naturalization in 1960. Contrary to defendant's sworn statements made for the purpose of acquiring citizenship, it is claimed that (1) he had committed crimes of moral turpitude, and (2) he was not a person of good moral character. Count IV alleges that defendant's citizenship was illegally procured since he in fact was not a person of good moral character. Finally, Count V states that, as a statutory matter, defendant was not a person of good moral character since he had given "false testimony for the purpose of obtaining . . . benefits" under the Immigration and Nationality Act. Section 101(f)(6) of the Immigration and Nationality Act, 8 U.S.C. §1101(f)(6).

I. Pre-Trial Proceedings

On September 24, 1980, the court granted the Government's motion pursuant to Rule 37(a), Fed.R.Civ. P., to compel defendant to answer certain enumerated

interrogatories. Defendant expressly defied the court's order by failing to fully answer the Government's interrogatories. The Government's subsequent motion for sanctions, wherein it requested that all relevant facts pertaining to the Government's unanswered interrogatories be deemed established, was granted. However, because of the peculiar nature of denaturalization proceedings, and in view of the "severe and unsettling consequences" which might ensue from the loss of citizenship, *Fedorenko v. United States*, 101 S.Ct. at 747, the court left defendant with the opportunity to rebut the facts which we would otherwise "deem [ ] established beyond a reasonable doubt . . ." (Memorandum of Decision and Order dated October 14, 1980 — finding of fact found at Appendix A). Following our imposition of sanctions pursuant to Rule 37(b)(2)(A) for the Failure to answer interrogratories, defendant failed to answer certain questions at his deposition continuing his earlier claim rejected by the court of a Fifth Amendment privilege against self-incrimination. The court again ordered defendant to provide the Government with discovery, this time through his deposition testimony, and defendant once again refused. Consequently, the Government's proposed findings of fact sought to be proved through defendant's deposition testimony which he failed to provide was deemed to be established beyond a reasonable doubt, subject to rebuttal by defendant at trial. (See Memorandum of Decision and Order dated January 12, 1982 — findings of fact found at Appendix B).

Though the Government had established the facts necessary to prove its *prima facie* case prior to trial, thereby relieving the Government of the need to offer evidence concerning many crucial facts pending the defense's offer of contradictory evidence at trial, the Government's pre-trial memorandum provided defendant with notice that it would present evidence on its

Direct case that would support its claims independent of the court's pre-trial fact findings made pursuant to Rule 37(b)(2)(A), Fed.R.Civ.P. (Government's Pre-Trial Memorandum mailed to defendant June 12, 1981).[2] Because the Government's offer of proof at trial overwhelmingly supported the allegations stated in its complaint, our decision today is based upon findings of fact established solely through the evidence adduced at trial.[3]

The case was tried before the court without a jury.

II The Trial

The defendant, Karl Linnas, was born on August 6, 1919 in Tartu, Estonia. He married his wife Linda on July 7, 1944 in Haapsalu, Estonia and entered the United States on August 17, 1951 for the purpose of establishing permanent residence. (Government Exhibit 31, K Linnas Petition for Naturalization).[4]

During the years 1940 through 1943, defendant resided in Tartu, Estonia. (GX-31, K. Linnas' Applica-

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[2] As we stated at the December 15, 1980 pre-trial conference, a trial on the merits would ensue in spite of the findings of fact made pursuant to Rule 37, Fed.R.Civ.P. The *only* advantage to the Government arising from the sanctions imposed on defendant for his failure to comply with discovery was that the Government had sustained its *prima facie* case. (Transcript filed with the court on January 26, 1981 at 10.)

[3] Defendant's counsel made numerous objections during the course of the trial that he was not given an adequate opportunity to prepare a defense. The objections were frivolous. The Government had expeditiously supplied the defense with extensive discovery. Moreover, on at least one occasion during the trial, the court offered the defense an opportunity to offer proof concerning an issue raised at trial at any time before the rendering of this decision. (Record 319-320). We note that the defense has failed to submit any further evidence since the completion of the in-court proceedings on June 19, 1981 which might suggest a different view of the facts than that which we have deduced from the evidence presented at the trial.

[4] Hereinafter, Government exhibits admitted into evidence shall be designed by the letters "GX".

tion for Immigration Visa and Alien Registration). In part, the trial focused on the activities of the German military forces, and the assistance provided them by an organization of Estonian nationals known as the "Home Guard" or "Self-Help" forces (referred to as the "Selbstschutz" by the Germans and as the "Omakaitse" by the Estonians) during the German occupation of Tartu which began in the summer of 1941. Specifically, the Government's case established clearly, unequivocally, and convincingly defendant's involvement as an active and voluntary member of the Selbstschutz starting in July of 1941. However, the information defendant had provided to immigration officials represented that he was a university student in Tartu during the period 1940-1943. Defendant failed to testify at trial on his own behalf,[5] and moreover, failed to appear at the trial.

A. Historical Background

The Government called Dr. Raul Hilberg to comment on the German military movement into the Soviet Union following the German invasion on June 22, 1941 and to describe various German policies and the imple-

[5] It is well within the discretion of a trial judge to draw an adverse inference against a defendant in a denaturalization proceeding because of his unexplained failure to testify on matters peculiarly within his knowledge. *Cabral-Avila v. Immigration and Naturalization Service*, 589 F.2d 957, 959 (9th Cir. 1968), *cert. denied*, 440 U.S. 920 (1978); *United States v. Costello*, 275 F.2d 355, 359 (2d Cir. 1960), *aff'd*, 365 U.S. 265, (1961). The Government, however, has sustained its burden without our drawing this permissible inference.

mentation of those policies during their initial assault.[6] Professor Hilberg testified that the German invasion into Estonia occurred in mid-July 1941. The invading German forces that swept through Tartu included the mobile killing units know as the "Einsatzkommandos." These units formed battalions, referred to as "Einsatzgruppen," which were charged with carrying out Nazi policy aimed at the annihilation of Jews and other groups found inimical to the Reich. (Record at 50-51, GX-2 through 10). Professor Hilberg described the operation of the Einsatzgruppen in one of his publications as follows:

> "When the German Wehrmacht — the armed forces — attacked the USSR on June 22, 1941, the invading armies were accompanied by small mechanized killing units of the SS and Police which were tactically subordinated to the field commanders but otherwise free to go about their special business. The mobile killing units were operating in the front-line areas under a special arrangement and in a unique partnership with the German Army.
>
> * * *
>
> The geographic distribution of Soviet Jewry determined to a large extent the basic strategy of the

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[6] The court found Dr. Hilberg eminently qualified to testify on these matters. Dr. Hilberg has researched the holocaust since 1948 and has had the opportunity to examine numerous collections of captured German documents for the purpose of reconstructing the situation in Eastern Europe during World War II. (Record at 27-28). He testified that there was only one collection in the United States which he had not visited. (*id.* at 30). The witness has written extensively on the holocaust which he defined as the "physical destruction of European Jewry under the Nazi regime between 1933 and 1945." (*id.* at 23). His first publication, *The Destruction of the European Jews*, was published in 1961 and documented the Germans' diabolical destruction plans during the period 1933 to 1945. The work is some 800 pages in length and is substantially based on information contained in captured Nazi German documents. (*id.* at 36-41).

> killing units. To reach as many cities as fast as possible, the Einsatzgruppen moved closely upon the heels of the advancing armies, trapping the large Jewish population centers before the victims had a chance to discover their fate. . . In accordance with the agreement, units of Einsatzgruppen A entered the cities of Kaunas, Lepaya, Yelgava, Riga, Tartu, Tallin and the Larger suburbs of Leningrad with advance units of the army." .
> (GX-1 at pp. 177 and 191).

The Einsatzkommandos executed their duties in Tartu, Estonia, with the assistance of the Estonian "Home Guard," the Selbstschutz[7] (Record at 52-57; GX-2 through 10). Dr. Hilberg's testimony was uncontroverted and is supported by captured German war records contained in the library of the United States National Archives. (GX-2 through 10).

Einsatzgruppen A, aided by the Selbstschutz, was successful in achieving one of its major objectives. By mid-January 1942, the Chief of the Security Police and the Security Service was able to report that Estonia was "Judenfrei" (free of Jews) and that the execution of the Jews had been handled in such a manner so as to minimize public attention to the fact of the German extermination process. (Record at 58, GX-6). While Jews were shot soley based upon the determination of their religious ancestry, Communists were shot only if they were active in the party, with the balance either being

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[7] In his testimony, Dr. Hilberg stated that "[t]he German personnel in the Einsatzgruppen did not [personally] engage in arrests or shootings to any great extend. They acted more as supervisors of indigenous personnel that were engaged in these activities." (Record at 55). The activities were carried out by the Germans' willing attendants–the Selbstschutz. (Record at 56).

set free or detained in concentration camps.[8] (Record at 56).

The Government offered the preceding historical evidence to establish, among other things, that if defendant was in fact a member of the Selbstschutz, then the Government's case would have shown that defendant assisted the enemy in persecuting civil populations. The evidence adduced at trial proved beyond a reasonable doubt that defendant was a ranking member of that organization; it also supported the conclusion that he committed deeds which, independent of his membership in the Selbstschutz, would require his denaturalization.[9]

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[8] As of September 19, 1941, the Chief of the Security Police and Security Service reported on the approximately 1200 arrests that had occurred in Tartu since the inception of German occupation earlier that summer:

> "The greater part of them involve persons who were arrested for Communist activity. 504 persons were set at liberty after inquiries were completed and they were registered in lists. 150 persons were released since there were obviously no grounds for arrest. 291 prisoners were transferred to the detention camp established and supervised by the Tartu Military Administration Headquarters. A total of 405 persons were executed in Tartu, including 50 Jews. There are no longer any Jews in custody." (GX-3).

[9] During some time in June 1940, the country of Estonia was annexed by the Soviet Union. Defendant's post-trial memorandum suggests that the forcible occupation and annexation of Estonia by the Soviet Union, given the atrocities which the Soviets committed during that conquest, provide ample justification for Estonians who chose to bear arms against the invaders of their homeland. We do not question justifiability of the Estonian desire to purge its land of the Soviet element. Nevertheless, defendant's motivations have no legal significance given the facts established by the Government at trial, e.g., defendant's supervision and participation in *atrocities* committed against human life. We also note that even if motivation could provide a basis for "legal justification," defendant offered no evidence on what *his* motivations were for joining the Selbstschutz and aiding the German cause.

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B. Linnas Involvement in the Selbstschutz

1. Eyewitness Testimony

The Government conducted video-taped oral depositions in the Soviet Union of four individuals. Three of the four deponents were shown an eight-picture photospread from which each positively identified defendant as an individual who held a position of responsibility in the detention of Jews and others being held either at the exhibition grounds located near Tartu or, after the concentration camp relocated, at the Kuperjanov Barracks on Kastani Street, The four individuals who testified by video-taped deposition were: Hans Laats, Olav Karikosk, Oskar Art, and Elmar Puusepp.

Hans Laats supervised the guards who guarded the prisoners at the Kuperjanov Barracks in Tartu. (GX-19-A at 17). He testified that Linnas served as a guard at the exhibition grounds and several months thereafter became the chief of the relocated concentration camp at the Kuperjanov Barracks. (*id.* at 22-23). Defendant, Laats, and the other guards at the camp were members of the Selbstschutz. (*id.* at 12, 15, 23).

Laats witnessed the execution of prisoners who had been held at the Kuperjanov Barracks. Those who were to be executed were kept in a special barracks at the camp on Kastani Street. (*id.* at 18). On a number of occassions he observed defendant supervising the prisoners who were being escorted out of the special barracks to an execution site. (*id.* at 23). Laats confessed to his own presence at one execution conducted at an anti-tank ditch (known as the "Jalaka Line") outside Tartu. This excavation had been converted by the Einsatzkommandos into a mass grave site for the victims of their extermination process. In recounting a portion of Jalaka Line execution, he stated that Linnas was the individual who had announced the death sentence and had commanded the guards to fire

on the prisoners who were kneeling at the ditch's edge.[10] (*id.* at 24).

Laats identified Linnas both at his video-taped deposition and at an earlier meeting with a representative of the Department of Justice as chief of the concentration camp at the Kuperjanov Barracks. (*id.* at 33-36). We find that the eight-picture photospread from which Linnas was identified, considering the totality of the circumstances, indicates that Laats identification of Linnas was reliable.[11] *Cf. Neil v. Bigger,* 409 U.S. 188, 199-200 (1972) (reliability of pre-trial identifications in the context of criminal prosecutions).

Olav Karikosk, a former concentration camp guard personally recruited by Linnas in October 1941, was ordered by Linnas to accompany him to an execution. (GX-20-A at 11-12, 24). The execution ritual was similar to the one described by Laats.[12] Karikosk positively

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[10] Laats further testified that Linnas thereafter approached the ditch and, administering the coup de grace, fired into it. (GX-19-A at 24-25).

[11] We also find that the pre-trial identifications made by Olav Karikosk and Oskar Art were reliable.

In making these determinations concerning reliability, we have been guided by the Court's recommendation in *Neil v. Biggers*:

> "[T]he factors to be considered in evaluating the likelihood of misidentification include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation." 409 U.S. at 199.

[12] He testified that "Jewish women and children . . . were tied by their hands to . . . rope and boarded on [a] bus . . . [after] they had been undressed so that they were there in their underwear," they were then taken outside the city to a so-called Jalaka Line some ten kilometers away from the city." (GX-20-A at 22-23). Upon arrival, the prisoners were commanded to kneel in front of the anti-tank ditch, their death sentences were given, and they were shot. (*id.* at 25-26).

identified Linnas at his video-taped deposition and on an earlier occasion as the chief of the concentration camp at the Kuperjanov Barracks.[13]

Oskar Art testified that he drove a bus which transported prisoners — on one occasion Jews, on two occasions non-Jews — to the Jalaka Line where they were shot. (GX-18-A at 18-24). Again, the execution ritual was similar to that described by Laats. Art stated that the prisoners were guarded by the Selbstschutz at all times. (*id.*). During one of the three executions in which he was involved, Linnas was present when the prisoners were herded onto the bus destined for the execution site and when they were shot. (*id.* at 29). Art had known Linnas before the German occupation, (*id.* at 26-27). Art saw Linnas frequently after becoming a prisoner at the camp. (*id.* 30-31). Laats believed that Linnas was chief of the guards at the camp and the highest ranking Estonian there. (*id.* at 32-34). After viewing a photospread virtually identical to those used in the previously mentioned video-taped depositions, Art identified Linnas as chief of guards at the concentration camp at the Kuperjanov Barracks.[14] (*id.* at 34-40).

Elmer Puusepp was arrested by members of the Selbstschutz during the summer of 1941 because he had been a political officer under the Soviet Government. (GX-21—A at 7-8). Puusepp was eventually brought to the Kuperjanov Barracks with a group of approximately forty prisoners. (*id.* at 18-20). The group was divided in

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[13] Karikosk selected Linnas from an eight-picture photospread identical to the one presented to Laats except for the juxtaposition of the photographs.

[14] The photograph of Linnas which appeared in each of the photospreads presented to the witnesses at each of the video-taped depositions conducted in the Soviet Union was the photograph of defendant submitted with his visa application in 1951.

half. (*id.* at 20). The group to which he was not assigned was sent to the "death barracks," and Puusepp never saw anyone in that group again. (*id.* at 20, 25).

Puusepp testified that the man who he came to know as Linnas on one occasion had received prisoners at the Tartu concentration camp. (*id.* at 20-21). He recounted a second instance in which he had seen Linnas participate in the operations at the Kuperjanov Barracks. This incident occurred in the City of Tartu when Linnas helped direct Jews being ordered from a Jewish school onto a red bus which had been used on other occasions to remove prisoners from the death barracks at the concentration camp. (*id.* at 29). Linnas was seen helping a little girl "5 or 6 years old" with a doll as large as she was onto the bus. (*id.*). Puusepp noticed a guard carrying the little girl's doll to storage that very same evening together with clothing and other personal effects taken from those persons who had just been executed. (*id.* at 31).

His account of the general conditions at the camp was as follows: prisoners were fed soups made out of "[h]alf-rotten horse corpes or horse carcasses," (*id.* at 22); lice prevented the prisoners from sleeping, (*id.* at 38); and the barracks were so "tightly packed" that, at times, it was impossible to turn over. (*id.*)

Dr. Keiland, a citizen of Finland at the time of trial and a resident of Tartu during the subject period, testified at trial and stated that he witnessed the detention of Jews and non-Jews — men, women, and children — at the exhibition grounds ("Naituse Valjak") in Tartu during July 1941. (Record at 177-179). During his several visits to the exhibition grounds he viewed "Jews lying, sitting and sleeping in [cages of barbed wire.] (*id.* at 178-181). Dr. Keiland did not see defendant at the camp on any of

his trips. (*id.* at 183). However, he did identify those guarding the detainees as members of the Selbstschutz. (*id.* at 179-180).

Each of the video-taped depositions was admitted into evidence. The defense refused to attend the depositions held in the Soviet Union because it contented that any such proceeding conducted there would be a sham. Evidence offered at trial through defense witnesses attempted to show that the Soviets, on many occasions, have manipulated and, at times, have manufactured evidence to convict innocent Soviet citizens for the purpose of attaining political objectives of the Soviet Communist party. In essence, defendant contents that we must adopt a *per se* rule excluding all evidence deriving from Soviet sources. In rejecting this contention, we simply note one of the fatal flaws in defendant's broadbush attack on Soviet-source evidence. In the context of this case, the defense witnesses were unable to cite *any* instance in a western court in which falsified, forged, or otherwise fraudulent evidence had been supplied by the Soviet Union to a court or other governmental authority. (Record at 470, 597-598, 646).[15]

The defense was unable to come forward with *any* proof that any of the Government's evidence offered at trial, either testimonial or documentary, was incredible or unauthentic in any respect. We find that defendant's defense by innuendo is without any merit. Having foresaken its right of cross-examination at the depositions

[15] After reading the deposition transcripts and viewing portions of each of the video-tapes taken in the Soviet Union, we find that the Government witnesses were credible.

taken in the Soviet Union, the defense cannot now claim foul play.[16] Moreover, various documents signed by Linnas (discussed hereunder) and the admission made by him to Richard Siebach (see note 17) corroborate the testimony of the Soviet witnesses as to Linnas' position and authority at the Tartu Concentration Camp.

2. Documents Signed by Linnas as Chief of the Concentration Camp

The Government offered copies of four documents bearing the signature "Karl Linnas" over the title "Chief of Concentration Camps" or "Chief of Tartu Concentration Camp" (GX-26, 27, 28, 30). These documents, dated November and December 1941, were certified by the Consular Division of the U.S.S.R. Embassy in accordance with Rules 902(3) and 902(4) of the Federal Rules of Evidence and Rule 44, Fed.R.Civ.P.

Each of the documents was admitted into evidence. The documents concerned the routine operation of the camp consisting of orders and correspondence pertaining to prisoners (GX-27, 28, 30) and a pass authorizing a guard to bear arms and travel at night (GX-26). These documents, if in fact signed by defendant, would establish Linnas' supervisory role at the Tartu Concentration Camp in the fall of 1941. We

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[16] The court however is disturbed by language used by the Soviet prosecutor when introducing members of the Department of Justice to deponents Oskar Art, Olav Karikosk, and Hans Laats. In each instance the Soviet official referred to the instant matter as an action by the United States against the former war criminal, Karl Linnas. The case was variously described as concerning: the "Fascist prisoner murder[er], Karl Linnas," (GX-18-A at 3) and "Karl Linnas, a former war criminal," (GX-19-A at 3, GX-20-A at 3). In evaluating the weight of the testimony given by these deponents, we have been mindful of the prejudicial language employed by the Soviet prosecutor. Accordingly, we have considered this evidence only as supportive and corroborative of the Government's primary evidence of Linnas' involvement at the Tartu Concentration Camp, the documents signed by defendant as chief of the concentration camp.

would further conclude that, as an Estonian, he was a member of the Selbstschutz aiding the Germans in the administration of their master plan.

Special Agent Michael Noblett of the Federal Bureau of Investigation, an expert document examiner, examined the four concentration camp documents and determined that (1) there were "strong indications" that the signatures were authored by defendant, (Record at 274), and (2) the physical condition and composition of the documents supported the conclusion that they are authentic, original and unaltered documents. (*id.* at 661-663). The defense failed to produce a document expert to challenge either their authenticity or the conclusion that defendant was the signatory. We find that the documents were signed by Linnas and are authentic and unaltered. The testimony of Laats, Karikosk, Art and Puusepp corroborates the finding that Linnas was a member of the Selbstschutz and served in a supervisory role in the management of the Tartu Concentration Camp.[17] We find that the Government has met its burden in establishing these facts.

C. Linnas' Service in the German Army Following his Departure from the Tartu Camps

The Government sought to establish that defendant voluntarily entered and served in the Estonian Schutzmannschaft as a junior lieutenant in May 1942, served in its successor organization, and then served in an Estonian Police Battalion between 1942

[17] The Government presented further corroborative evidence of defendant's involvement at the concentration camp in Tartu, Estonia. Richard Siebach testified that defendant denied he had headed the Tartu camp in response to a question by Siebach about a newspaper article on that subject. Rather, defendant claimed only to have been a guard at the Tartu camp. (Record at 306-307).

and 1944. Each of these military forces was an integral part of the German Army in World War II. (Record at 98-102; GX-13 and 14).

We find that defendant voluntarily joined one of the component units of "Security Cadre 41-E" in Tartu, Estonia.[18] (Record at 98; GX-11). This unit, composed largely of members who had served in the Selbstschutz, (Record at 90), was redesignated Schutzmannschaft Battalion 41-E within two months after defendant joined it. (Record at 97; GX-12).

Evidence presented by the Government *compels* the conclusion that some time prior to July 1944 defendant was transferred to the 38th Police Battalion. (Record at 103; GX-15, 16, 17). In July 1944 the 38th Estonian Police Battalion served under the command of an "SS Oberfuhrer" (Senior Colonel) and went into battle in an effort to halt the massive Soviet counter-offensive which was then underway. (Record at 105-106). The documents presented by the Government show beyond any reasonable doubt that Linnas was a volunteer in the 38th Police Battalion. (see Appendix C). The captured German documents, GX-15, 16, 17, contain a great deal of personal information concerning a wounded lieutenant SS volunteer named Karl Linnas. The information contained therein coincides with the information found in defendant's immigration records:

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[18] Dr. Hilberg testified that individuals taken into such units in May of 1942 would have been volunteers. (Record at 94). He had no knowledge of conscription into those units at that time. (*id.*).

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	Information From Captured German Documents	Information From Defendant's Immigration Record
Name:	1. Karl Linnas (GX-15, 16, 17)	1. Karl Linnas (GX-31, 39)
Birth Date:	2. August 6, 1919 (GX-16, 17)	2. August 6, 1919 (GX-31, 39)
Place of Birth:	3. Tartu, Estonia (GX-17)	3. Tartu, Estonia (GX-31, 39)
Wounded in Battle:	4. August 30, 1944 (GX-15)	4. August, 1944 (GX-39)
Date of Marriage:	5. July 7, 1944 (GX-15)	5. July 7, 1944 (GX-31)
Wound or Marks of Identification:	6. Large schrapnel penetration to right shoulder joint and upper right arm. (GX-17)	6. Scar on right shoulder and back of neck. (GX-31)

The Government's evidence is uncontroverted and overwhelmingly establishes defendant's service in the 38th Police Battalion, an arm of the German Wehrmacht. Accordingly, we find that defendant served in the German armed forces during World War II.

III. Discussion

A. Postwar Immigration Procedures

In order to understand how defendant failed to comply with the conditions for naturalization, it is necessary to describe briefly the route which an alien

was required to travel.[19] The Government witnesses who offered testimony concerning the standard operating procedures of officers and employees of the International Refugee Organization (the "IRO"),[20] the Displaced Persons Commission, and the American Consulate described the process just as it was outlined by Chief Judge Battisti in *United States v. Demjanjuk*, Dkt. No. C-77-923, Slip Op. at 30-31 (N.D. Ohio June 23, 1981):

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[19] In reviewing the immigration process, we must of course bear in mind that strict compliance with *all* condictions for naturalization is required:

> "This judicial insistence on strict compliance with the statutory conditions precedent to naturalization is simply an acknowledgement of the fact that Congress alone has the constitutional authority to prescribe rules for naturalization, and the courts' task is to assure compliance with the particular prerequisites to the acquisition of United States citizenship by naturalization legislated to safeguard the integrity of this "priceless treasure." *Johnson v. Eisentragger*, 339 U.S. 763, 791, 70 S.Ct. 936, 950, 94 L.Ed. 1155 (1950) (Black, J., dissenting)."

Fedorenko v. United States, 101 S.Ct. at 747 (footnote omitted).

[20] The IRO was an organization sponsored by the United Nations. Its Constitution was signed by the United States on December 16, 1946 (T.I.A.S. No. 1846) and became effective on August 20, 1948. See 62 Stat. 3037. Part two of Annex I of the IRO Constitution, 62 Stat. 3037, 3051 (1946), provided that certain persons would *not* be considered the "concern" of the IRO:

> "1. War criminals, quislings and traitors.
>
> 2. *Any other persons who can be shown:*
>
> (a) *to have assisted the enemy in persecuting civil populations of countries, Members of the United Nations; or*
>
> (b) to have voluntarily assisted the enemy forces since the outbreak of the second world war in their operations against the United Nations."
>
> .... (emphasis added)

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"In 1948, Congress enacted the Displaced Persons Act (DPA) to enable European refugees driven from their homelands to emigrate to the United States.[21] Section 2(b) of the DPA, 62 Stat 1009, defined a displaced person eligible for emigration by incorporating the definition of 'refugees or displaced persons' contained in Annex I to the IRO Constitution . . . .[22] A person seeking a visa to the United States under the DPA normally followed a tripartite procedure.

First, a refugee filed an application for IRO assistance. The applicant was interviewed by an IRO eligibility officer who elicited information about the applicant's personal and family history, with special emphasis on the war years, in order to determine whether the applicant was qualified under the IRO

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[21] The mass dislocation of persons caused by the devastation of World War II is well documented. The *Demjanjuk* court capsulized the magnitude of the problem as follows:

> "Following the conclusion of the war, the Allied armies became the guardians of about 8,000,000 persons including those liberated from extermination camps, former prisoners of war, and thousands of other persons dislocated by the hostilities. By 1948, 7,000,000 of these uprooted persons had been repatriated leaving approximately 1,000,000 persons in the United States, British, and French zones of Germany, Austria and Italy. S.Rep. No. 950, 80th Cong., 2d Sess., U.S.Code Cong.& Ad.News 2028, 2035 (1948). Many of these people lived in camps operated by the International Refugee Organization (IRO), an organization founded in 1946 to offer care and assistance to the dislocated masses and to provide for their eventual repatriation."
>
> Slip Op. at 29.

[22] Accordingly, the same persons who were not eligible for IRO assistance were also ineligible for lawful admission into the United States by virtue of Section 2(b) of the DPA. See note 20, *supra*.

constitution . . . . The primary source of background information inevitably came from the applicant himself. If qualified, the refugee was granted IRO assistance.

Next, the refugee sought to qualify as an eligible displaced person under the DPA. The Displaced Persons Commission was the agency in charge of implementing the DPA. Under sections 2(b) and 10 of the DPA, 62 Stat. 1009, 1013, positive eligibility under the IRO was a preliminary requisite. The IRO file containing the history of the particular refugee and the certification of IRO status was forwarded to the Displaced Persons Commission. A case analyst then made certain security checks on the background of the applicant to determine eligibility under the DPA and issued a report certifying that the applicant was a person eligible for admission into the United States under the DPA. . . .

Finally, the case analyst forwarded an applicant's file, containing both the preliminary IRO certification and the Displaced Persons Commission report to the appropriate American Consulate. The applicant appeared at the consular office and was matched with an interpreter-typist, who assisted the applicant in filling out the application for an immigration visa. A vice-consul at the American Consulate reviewed the visa application and other documents in the applicant's file. The vice-consul then interviewed the applicant and, at a minimum, reviewed with the applicant all the entries which appeared on the visa aplication [sic]. If the vice-consul

deteremined that the applicant met the criteria of the DPA and other immigration laws, he issued the applicant a visa."[23]

The immigration process leading to defendant's entry into the United States began in February 1948 when defendant's father, August Linnas, filed with the Preliminary Commission for the International Refugee organization ("PCIRO")a signed and sworn application for assistance, on behalf of himself and his family, including defendant. (GX-38-B). The application stated that defendant was a student and technical artist in Tartu, Estonia from 1940 through 1943.

In mid-December 1949, defendant's wife, Linda Linnas, filed an IRO Resettlement Registration Form on behalf of herself, defendant and defendant's daughters. (GX-31). In reliance upon the information contained in the Application for Assistance to PCIRO and the Resettlement Registration Form, the IRO certified defendant as a displaced person and refugee, as defined in Annex I of the IRO Constitution, on

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[23] "Section 10 of the DPA was amended by § 9 of the Act of 1950, 64 Stat. 219, 225-226 (1950) to clearly allow the vice-consul to make the final determination of eligibility of applicants, both under the DPA and under the general immigration laws. Conference Report, 81st Congress, 2d Sess., U.S.Code Cong.& Ad.News 2513-2523 (1950). Section 9 provided: 'no person shall be issued an immigration visa or be admitted into the United States under this Act if the consular officer or the immigrant inspector knows or has reason to believe that the alien is subject to exclusion from the United States under any provision of the immigration laws or (1) is not a displaced person and an eligible displaced person, or (2) is not eligible under the terms of this Act. . . .'" *United States v. Demjanjuk*, Dkt. No. C-77-923, Slip Op. at 31 n. 35 (N.D.Ohio June 23, 1981).

December 29, 1949. Karl Linnas in fact was not entitled to such certification.[24]

On April 27, 1951, James McDonald, a case analyst for the United States Displaced Persons Commission (the "Commission"), issued a report stating that Karl Linnas was eligible for consideration for admission into the United States.[25] However, defendant's certification as an eligible displaced person was made possible only as a result of the false statments he had made to members of the Counter Intelligence Corps of the United States Army (the "CIC") that, among other things, he had been a university student in Tartu, Estonia during the period 1940-1943,[26] he had

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[24] The deposition testimony of Daniel Segat, an expert on the eligibility criteria for IRO assistance, was admitted into evidence. (GX-38). Mr. Segat, the Chief Eligibility Officer for the entire IRO operation between September 1950 and September 1951, (GX-38 at 8-9), testified that defendant would have been found ineligible for IRO assistance based on either his service as a concentration camp chief or guard in a German-occupied territory during World War II, (*id.* at 23-24), or based on his voluntary service in an Estonian Police Battalion or an Estonian unit of the Schutzmannschaft, (*id.* at 24).

[25] McDonald's responsibility as a case analyst was to determine an applicant's eligibility status under the DPA. (Record at 478). In making his evaluation, he relied on reports generated by the United States Army Counter Intelligence Corps (the "CIC"). (*id.* at 481). He testified that he would not have certified defendant as an eligible displaced person had he been aware of his service as a concentration camp guard. (*id.* at 483-484).

[26] Dr. Keiland testified that the University at Tartu ("Tartu Ulikool") was closed during the summer and the autumn of 1941. (Record at 184). The consolidated report of German Major General Walther Stahlecker to the German Foreign Office concerning the activities of Einsatzgruppe A (June 23, 1941 through October 15, 1941) reported that educational activities had been halted at both the University of Tartu and the Technical Institute in Tallin. (GX-9-A at 95).

never served in the German Army and he had not been a member of any political group or organization.[27]

On May 17, 1951, defendant filed a signed and sworn Application for Immigration Visa and Alien Registration with the United States Consulate at Munich, Germany, in which he claimed status as a displaced person. Defendant was issued an immigration visa on that same date. Ralph Fratzke, a former Vice Consul, United States of America, testified to the procedures by which visas were issued. He testified that a visa would not have been issued if the vice consul had known of defendant's wartime activities.[28] (Record at 507-508).

On May 21, 1951, defendant was examined by an officer of the Immigration and Naturalization Service (the "INS"), Walter Ziemak, for the purpose of determining whether Linnas was eligible to enter the United States. At that time, defendant signed two copies of INS Form I-144, one in Estonian and one in English. (GX-31). In accordance with the routine practice of the INS, Ziemak explained to defendant the contents of the form after defendant had read it, but before defendant affixed his signature to it. (Record at 525). By signing Form I-144 and then swearing to its contents upon entering the United States on August 17, 1951, defendant twice falsely stated that he had "never advocated or assisted in the persecution of any person because of race, religion or national origin. . . ."

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[27] The Government established that defendant had made these false statements through the testimony of former CIC members Victor Johansen, (Record at 321, *et seq.*), Richard Priem, (*id.* at 374, *et seq.*) and Ray Whiteturky, (*id.* at 402, *et seq.*). See also (GX-39).

[28] Mr. Fratzke testified because the individual responsible for issuing Karl Linnas' visa had died. (GX-41; Record at 501-502).

B. Defendant's Naturalization

Defendant executed an application to file a petition for naturalization as an American citizen on July 4, 1959. (GX-31). The INS checked petitioner's application against his immigration and visa file to determine that defendant's entry into the United States had been lawful.[29] (Record at 541-542, 544). It was routine practice for INS naturalization examiners to orally question petitioners concerning each of the questions on the application for naturalization. (*id.* at 545). Each applicant's interview was conducted under oath. (*id.* at 543). On December 14, 1959, defendant was examiuned by the INS and falsely swore to the contents of his petition. Specifically, in answer to question 23, defendant denied that he had ever "committed a crime involving moral turpitude" or that he had ever "given false testimony for the purpose of obtaining any benefits under the immigration and naturalization laws."

On February 5, 1960, the Supreme Court of Suffolk County, New York, without knowledge of defendant's true activities and whereabouts during World War II, admitted defendant to United States citizenship.

C. Conclusion of Law

The United States Constitution vested Congress with plenary power in establishing rules for naturalization.[30] Pursuant to that power, Congress enacted Sections 340(a) of the Immigration and Nationality Act, 8 U.S.C. § 1451(a), which provides that a naturalized citizen shall suffer the loss of his citizenship

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[29] David Ilschert, a former naturalization examiner in the New York office during the period in which defendant was naturalized, testified concerning the naturalization process. (Record at 537, *et seq.*).

[30] Congress is empowered to "establish a uniform Rule of Naturalization" under Article I, Section 8, Clause 4.

if the privileged status was "illegally procured" or "procured by concealment of a material fact or by willful misrepresentation." We find that defendant's denaturalization is required under either standard.

1. Citizenship Illegally Procured

Citizenship is illegally procured if "some statutory requirement which is a condition precedent to naturalization is absent at the time the petition [for naturalization] was granted." H.R.Rep.No. 1086, 87th Cong., 1st Sess. 39, *reprinted in*, U.S.Code & Ad.News 2950, 2983 (1961). *See Rogers v. Bellei*, 401 U.S. 815, 830 (1971); *United States v. Ginsburg*, 243 U.S. 472, 475 (1917). Here, defendant lacked two statutory prerequisites for citizenship.

a. Defendant Was never Lawfully Admitted to the United States[31]

Since defendant entered the country under the Displaced Persons Act, the legality of his entry depends upon his eligibility under that Act. Section 2 of the DPA makes ineligible those persons who *"have assisted the enemy in persecuting civil populations of countries, Members of the United Nations . . . ."*[32] (emphasis added).

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[31] The requirements for legally procuring naturalized citizenship are set out in Section 316 of the Immigration and Nationality Act, 8 U.S.C. § 1427. Section 316(a)(1) provides, *inter alia*, that:

> *Residence*
>
> (a) No person, except as otherwise provided in this title, shall be naturalized unless such petitioner (1) immediately preceding the date of filing his petition for naturalization has resided continuously, after being *lawfully* admitted for permanent residence, within the United States for at least five years ***. (Emphasis added).

[32] See note 22, *supra*. Further, Section 13 of the DPA, as amended in 1950, 64 Stat. 227, provided that no visa would be issued under the Act to "any person who advocated or assisted in the persecution of any person because of race, religion, or national origin. . . ." Accordingly, we also find that defendant failed to satisfy Section 13 of the DPA.

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The facts speak for themselves. It is beyond dispute that defendant, Karl Linnas, "assisted the enemy in persecuting civil populations of countries, Members of the United Nations." *See Fedorenko v. United States*, 101 S.Ct. at 750 ("an individual's service as a concentration camp armed guard–whether voluntary or involuntary–made him ineligible for a visa"). The inescapable conclusion is that defendant unlawfully entered the country because of the willful misrepresentations he made to the CIC and the INS for the purpose of gaining entrance into the United States:

> ". . . Any person who shall willfully make a misrepresentation for the purpose of gaining admission into the United States as an eligible displaced person shall thereafter not be admissible into the United States." Section 10 of the DPA, 62 Stat. 1013.

Under the explicit terms of the law governing defendant's entry, his willful,[33] material[34] misrepresentations made him ineligible for a visa.

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[33] The evidence which we have discussed compels the conclusion that defendant's misrepresentations concerning his wartime activities, specifically, his participation in Nazi atrocities, were not inadvertent. Rather, his misrepresentations were knowing and willful. This conclusion is further supported by defendant's perjury in 1946 during which time he filed a signed and sworn questionnaire for displaced persons. (GX'32). In it he stated that, during the years 1941 and 1942, he was employed as a temporary draftsman and student. In response to a question requiring disclosure of all military and political activity from 1936 to 1946, he failed to disclose any military service during 1941 and 1942.

[34] Defendant's misrepresentations concerning his service of the German Reich were material. Each of the Government witnesses questioned concerning the consequences of having served as a guard in a concentration camp indicated that such an individual would be ineligible for either IRO assistance or for

(footnote continued on following page)

b. Defendant Lacked the Requisite Moral Character

The second unsatisfied statutory condition precedent which made defendant's entry into this country unlawful derived from his lack of good moral character at the time he entered the United States. We find that defendant did not possess the required good moral character because of his voluntary involvement in the unjustifiable atrocities committed against men, women and children a relatively short period of time prior to his entry into this country. *See Tieri v. INS*, 457 F.2d 391 (2d Cir. 1972).

Section 316(a)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1427(a)(3), provides in pertinent part that:

> "(a) No person, except as otherwise provided in this subchapter, shall be naturalized unless such petitioner, *** (3) during all the period referred to in this subsection has been and still is a person of good moral character. . . ."

Because we find that defendant failed to satisfy this condition for naturalization his award of citizenship was unlawful and must be revoked pursuant to Section 340(a) of the Immigration and Nationality Act, 8 U.S.C. § 1451(a).[35]

(footnote continued from preceding page)
immigration under the DPA. (GX-38 at 24; Record at 342, 389, 484, 508-509, 528-529). "At the very least, a misrepresentation must be considered material if disclosure of the true facts would have made the applicant ineligible for a visa." *Fedorenko v. United States*, 101 S.Ct. at 749. The misrepresentation was equally material for purposes of defendant's naturalization. (Record at 557-558, 562).

[35] Defendant's lack of good moral character is also established by virtue of the false statements made on his petition for naturalization. Section 101(f)(6) of the Immigration and Nationality Act, 8 U.S.C. § 1101(f)(6), provides in pertinent part:

(footnote continued on following page)

Based on the foregoing, it is patently clear that defendant's citizenship was illegally procured and must be revoked.

2. Citizenship Procured by Concealment of a Material Fact or By Willful Misrepresentation

An alternative ground requiring the cancellation of defendant's certificate of naturalization ensues from the willful, material misrepresentations he made to the Government during the procedures leading to his naturalization in 1960. Section 340(a) of the Immigration and Nationality Act, 8 U.S.C. § 1451(a). In stating (1) that he had never "committed a crime involving moral turpitude," (GX-31, Form N-400, question 23) and (2) that he was and had been "during all periods required by law, a person of good moral character," (GX-31, Form N-405, statement 15), defendant knowingly concealed, among other things, the facts of his service at the concentration camp in Tartu, Estonia during World War II. These facts were material under any view of the test of materiality as announced in *Chaunt v. United States*, 364 U.S. 350 (1960). *See Fedorenko v. United States, supra.* Consequently, defendant's naturalization must be revoked because it was procured by a willful misrepresentation of material facts.

"No person shall be regarded as, or found to be, a person of good moral character who, during the period for which good moral character is required to be established is, or was . . .

* * *

(6) one who has given false testimony for the purpose of obtaining any benefits under this Act."

The misrepresentations made to the Displaced Persons Commission and Vice-Consul were false statements within the meaning of Section 101(f)(6) of the Immigration and Nationality Act.

Appendix H
Decision and Order of United States
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IV. Conclusion

For the reasons set forth above, it is hereby

ORDERED that the order of the Supreme Court of the State of New York, Suffolk County, dated February 5, 1960, admitting defendant, Karl Linnas, to United States citizenship be, and the same is, hereby revoked and vacated, and his Certificate of Naturalization, Number 7641679, is cancelled on the grounds that such order and Certificate were illegally procured and were procured by willful misrepresentation of material facts under Section 340(a) of the Immigration and Nationality Act, 8 U.S.C. § 1451(a); and it is further

ORDERED that Linnas' Certificate of Naturalization, Number 7641679, shall be surrendered and delivered by Linnas to the Attorney General of the United States or his representative, the United States Attorney for the Eastern District of New York, on or before August 15, 1981;[36] and it is further

ORDERED that Karl Linnas is forever restrained and enjoined from claiming any rights, privileges or advantages of United States citizenship, including under or through any document evidencing United States citizenship; and it is further

ORDERED that the Clerk of the Court is directed: (1) to send forthwith a certified copy of this memorandum of decision and order to the Attorney General of the United States;[37] (2) to send a certified copy of

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[36] *See* 8 U.S.C. § 1451(h). Surrender of defendant's Certificate of Naturalization is stayed pending appeal upon the condition that defendant file a notice of appeal within ten (10) days from the date of entry of judgment and diligently prosecute said appeal.

[37] *See* 8 U.S.C. § 1451(h).

this memorandum of decision and order, and a certified copy of the judgment to be entered forthwith, to the Supreme Court of the State of New York, County of Suffolk,[38] and (3) to expeditiously enter judgment in favor of plaintiff United States of America and against Karl Linnas granting the relief requested in the complaint.

/s/ _____
U. S. D. J.

[38] *See* 8 U.S.C. § 1451(h).

Appendix H
Decision and Order of United States District Court Dated July 30, 1981

Appendix A

The facts found in our October 24, 1980 decision were as follows:

1. Defendant resided in the city of Tartu, Estonia, during all or part of the period July1, 1941 to May 31, 1943, at or near a site known as "the Kuperjanov Barracks."

2. In 1949, defendant resided in or near Neuberg, Germany where, during 1949, he initiated or caused to be initiated application precedures for a United States Immigiation Visa as a displaced person, pursuant to the Immigration and Nationality Act of 1924, as amended, and the Displaced Persons Act of 1948, Pub.L.No. 774 (62 Stat. 1009).

3. Defendant did not attend the University of Tartu at any time after July 1, 1941. He did attend and graduate from an Estonian Army Officers Traning Academy prior to the date, and on that date held the rank of Second Lieutenant or its equivalent in the Estonian Army Reserve.

4. On or before July 1, 1941, defendant was a member of the paramilitary organization known as the "Omakaites." Defendant held the rank of Second Leiutenant in this organization, which assisted the military forces of Nazi Germany in conducting arrests, imprisonments, physical abuse, and execution of unarmed civilians in German-occupied Estonia during all or part of the period July 1, 1941 to May 31, 1943.

5. During the period August, 1941 to May 1943, military and paramilitary forces of Estonia and Nazi Germany established and administered, under the supervision of the occupying military and police forces of Nazi Germany, concentration camps at various sites in Tartu, Estonia, including, but not limited to, those sites known as "Naituse Valjak" and the Kuperjanov Barracks," in which unarmed Estonia civilians, including

men, women and children were imprisoned on the basis of race, religion or political opinion.

6. Defendant commanded the Tartu concentration camps at Tartu, Estonia, or was a member of the security forces of said concentration camps, during all or part of the period August, 1941 to May, 1942, inclusive.

7. During the period August, 1941 to May, 1942, the security forces at the Tartu concentration camps included what was known as the "special section," which selected prisoners, including unarmed civilian men, women and children to be put to death.

8. On one or more occasions between August, 1941 and May, 1942, defendant, on the basis of a list prepared and supplied to him by the aforesaid "special section" supervised the removal of prisoners from the barracks at the Tartu concentration camp and their transfer to a site known as the "Jalaka Line" located near Tartu, and there supervised their execution.

9. In this capacity as an officer at the Tartu concentration camps, defendant wore the uniform of a Second Lieutenant or equivalent rank of the pre-1940 Estonian Army. He was armed with a pistol, which he carried to the aforesaid execution site, and from time to time fired that pistol at unarmed civilians in the course of their executions.

10. On or about May 26, 1942, defendant became a member of a military unit known as the Security Cadre Unit 41"E", as acting platoon leader of the heavy machine gun company. This unit assisted the military and police forces of Nazi Germany in Operations in German-occupied Estonia.

11. On August 30, 1944, defendant was a member of a military organization known as the 38th Estonian Police Battalion, in which he served as a Second Lieutenant or equivalent rank. This unit assisted the military

and police forces of Nazi Germany in operations in German-occupied Estonia.

12. For some or all of his services at the Tartu concentration camps, in the heavy machine gun company of Security Cadre Unit 41 "E", and in the 38th Estonian Police Battalion, defendant was paid by the government of Nazi Germany.

13. On August 30, 1944, while a Second Leiutenant or its equivalent rank in the 38th Estonian Police Battalion, defendant was wounded and evacuated to Nazi Germany, at which time defendant continued to be supported by the government of Nazi Germany.

Appendix B

The findings of fact were as follows:

FACT: On August 22, 1945, United States military authorities issued to defendant an "A.E.F. Registration Record," also known as a "DP-2 card."

FACT: On or about August 27, 1946, defendant filed with the Third United States Army at Gerstsried Displaced Persons camp in Germany, a questionaire for displaced persons, in the Estonian language, signed and sworn by defendant. [GX-32 admitted into evidence].

In response to this questionaire, defendant stated, in item 6(b), that during the years 1941 and 1942, his occupation was as temporay draftsman and student. He further stated, in response to a question requiring disclosure of all military and political activity 1936-1946 (item 7), that his only service was in the Army of the Democratic Estonian Republic, 1938-1940, as a sergeant, and in as Estonian security ballalion in Tartu, Estonia 1943 to 1944, as a sergeant. In fact, during all or part of the period August 1941 to May 1942, inclusive, defendant was a member of the *Omakaitse* (Estonian Self-Defense) with the rank of second lieutenant, and commanded or was a member of the security forces of the Tartu con-

centration camps at Tartu, Estonia, and at no time during the period August 1941 to May 1942 was he a student.

Following defendant's misrepresentation, the Third United States Army established defendant's status as a displaced person.

FACT: On July 5, 1947, United States military authorities issued to defendant an "S.E.F. Registration Record," also known as a "DP-3 card". . . .

FACT: On or about February 6, 1948, defendant's father, August Linnas, with defendant's knowledge and approval, filed with the Preliminary Commission for the International Refugee organization a signed and sworn Application for Assistance (CM/1 form), in the German language, numbered 845742, on behalf of August Linnas, Ida Linnas (defendant's mother), Karl Linnas (defendant), Linda Linnas (defendant's wife), and Anu and Tiina Linnas (defendant's daughters) (GX-38-B admitted into evidence). This application stated that from 1940 to 1943 Karl Linnas was a student and technical artist in Tartu, Estonia, and further that he was a university student from 1938 to 1943, when in fact, during all or part of the period August 1941 to May 1942 inclusive, defendant commanded or was a member of the security forces of the Tartu concentration camps at Tartu, Estonia, and at no time during the period August 1941 to May 1942 was he a student.

FACT: On or about December 16, 1949, defendant's wife, Linda Linnas, with defendant's knowledge and approval, filed an International Refugee Organization Resettlement Registration Form, bearing CM-1 number 845742, signed and sworn by Linda Linnas, on behalf of Linda Linnas, Karl Linnas (defendant) and Anu and Tiina Linnas (defendant's daughters) [GX-38-C admitted into evidence].

In reliance upon information provided in this form and in other documents referenced in this form, on

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December 29, 1949 the International Refugee Organization certified defendant as a displaced person and refugee, as defined in Annex I of the IRO Constitution, and as of concern to the IRO, when in fact, by virture of his activities at the Tartu concentration camps, he was not entitled to such certification.

FACT: On one or more occasions prior to April 27, 1951, defendant was interviewed by representatives of the Counter Intelligence Corps, United States Army (hereinafter CIC) on behalf of the United States Displaced Persons Commission, for the purpose of establishing eligibility as a displaced person under the Displaced Persons Act of 1948, as amended. Defendant stated to the CIC that he was drafted into the Estonian Army on July 1, 1938 and served until June 1940, that he was again drafted into the Estonian Army on May 22, 1943 and served with the "Estonian Home Guard, Kreis Tartu" in the vicinity of Tartu, Estonia until he was wounded in August 1944, that he never served in the German Army or wore a German Army uniform, and that he had not been a member of any political group or organization, when in truth and in fact, as the defendant well knew, he had been a second lieutenant in the Omakaitse (Estonian Self-Defense) and in that capacity had been a commander or member of the security forces of the Tartu concentration camps during all or part of the period August 1941 to May 1942.

FACT: On or about April 27, 1951, James P. McDonald, a case analyst for the United States Displaced Persons Commission (hereinafter the Commission), based on the Commission's investigation and on statements, certifications and other documents contained in the Commission's files, issued on behalf of the Commission a report stating that the Commission had established that defendant had not advocated or assisted in the persecution of any person because of race, religon or national origin, and certified him as eligible for consideration

for admission to the United States as a displaced person under Section 2(c) of the Displaced Persons Act of 1948, as amended.

FACT: On or about May 17, 1951, defendant filed an Application for Immigrant Visa and Alien Registration (Form 256a), signed and sworn by defendant, with the United States Consulate at Munich, Germany in which he claimed status as a displaced person [GX-31 admitted into evidence]. Attached as part of this application was the photograph of defendant, signed on the front and back by him. Also filed as part of this application and submitted herewith as part of [GX-31] was identity card number 004235 for Karl Linnas, dated August 22, 1941, a marriage certificate for Karl Linnas and Linda Saks, dated July 7, 1944, and four good conduct certificates pertaining to defendant's conduct in post-war Germany.

FACT: On August 17, 1951, defendant entered the United States for the purpose of immigration at New York, New York. Upon entry into the United States, he signed and swore to two copies of an "Affidavit as to Subversive Organizations or Movements" (INS Form I-144) [GX-31 admitted into evidence], one in the Estonian language and one in the English language, stating that he had never advocated or assisted in the persecution of any person because of race, religion or national origin. This affidavit had been read by and explained to defendant by an American official at Augsburg, Germany on or about May 21, 1951.

Appendix C

One of the documents establishing defendant's service in the 38th Estonian Police Battalion is Government Exhibit 15-A, a German Nazi document captured by the allies, which reads as follows:

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(stamp) (120)
Higher SS and Police Commander (HSSPf), (stamp:
Baltic Sea Feb. 13, 1945)
Welfare Headquarters–Subsidiary Office I
Schwerin, Feb. 2,
File symb.: F.U.Ausland Ja/HO Arsenal 1945
Subj.: Volunteer pay

(stamp: Office for
To: Member Support Abroad
SS Race & Colonization Main Office rec.: Feb. 10, 1945)
–Office for Member Support Abroad–

Prague II

Karl Laznowsky Quay 60

The Estonian volunteer, Lieutenant of Protective Police *Karl Linnas*, born on Aug. 6, 1919, belongs to Police Front Battalion 38, APO no. 46,903, he was wounded on Aug. 30, 1944. He is now under outpatient treatment here in Schwerin and is residing with his wife at Severinstr. 34. He has been married since July 7, 1944.

About mid-December 1944 he applied to you through his hospital for continued disbursement of compat pay, which he has not received since July 1, 1944.

I request to be informed immediately as to what became of his application, since the combat pay is urgently required for his living expenses. Remittance can be made to account no. 6082 of the Sparkasse (Savings Bank) in Schwerin/Mecklenburg.

(stamp: NOT IN FILE)

(signature)

SS 1st Lieut. (Reserve)

Appendix I
Constitutional Provisions and Statutes Involved

CONSTITUTION OF THE UNITED STATES

FIFTH AMENDMENT

No person shall be . . . compelled in any criminal case to be a witness against himself . . . ."

FEDERAL RULES OF CIVIL PROCEDURE

RULE 44(a)(2)

Proof of Official Record. (a) Authentication.

* * *

(2) Foreign. A foreign official record, or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof; or a copy thereof, attested by a person authorized to make the attestation, and accompanied by a final certification as to the genuineness of the signature and official position (i) of the attesting person, or (ii) of any foreign official whose certificate of genuineness of signature and official position relates to the attestation or is in a chain of certificates of genuineness of signature and official position relating to the attestation. A final certification may be made by a secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned to the United States.

Appendix I
Constitutional Provisions and Statutes Involved

FEDERAL RULES OF EVIDENCE

RULE 902(3), (4)

Self-authentication.

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

* * *

(3) Foreign public documents. A document purporting to be executed or attested in his official capacity by a person authorized by the laws of a foreign country to make the execution or attestation, and accompanied by a final certification as to the genuineness of the signature and official position (A) of the executing or attesting person, or (B) of any foreign official whose certificate of genuineness of signature and official position relates to the execution or attestation or is in a chain of certificates of genuineness of signature and official position relating to the execution or attestation. A final certification may be made by a secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of official documents, the court may, for good cause shown, order that they be treated as presumptively authentic without final certification or permit them to be evidenced by an attested summary with or without final certification.

(4) Certified copies of public records. A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and

actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification, by certificate complying with paragraph (1), (2) or (3) of this rule or complying with any Act of Congress or rule prescribed by the Supreme Court pursuant to statutory authority.